Supreme Court, U.S.
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No. 99-1261

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IN THE
Supreme Court of the United States

MICCOSUKEE CORPORATION,
Petitioner,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a tribal contractor is entitled to a judgment for the reimbursement of contract support costs agreed to be paid under an Indian Self-Determination and Education Assistance Act contract where (1) Congressional policy and statutory language provide the Secretary with the authority to agree to the full amount of contract support costs necessary for the tribal contractor to operate the federal program; (2) the contractor and the United States agreed to an amount to be paid under the contract, and the contractor fully performed; but (3) where the Secretary did not disburse the funds because Congress subsequently failed to appropriate sufficient funds to pay the amount agreed to under the contract.

PARTIES TO THE PROCEEDING

The parties to the proceeding include the Miccosukee Corporation which is controlled, sanctioned and chartered by the Miccosukee Tribe of Indians of Florida and Secretary of the Interior Bruce Babbitt and the related agency, Bureau of Indian Affairs.

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JUDGMENTS BELOW

The opinion of the Federal Circuit dated October 29, 1999, is unpublished and reprinted in the Appendix at p. 1a. The opinion adopts as its reasons a Federal Circuit opinion dated October 27, 1999, entitled *Babbitt v. Oglala Sioux Tribal Pub. Safety Dept.*, 194 F.3d 1374 (Fed. Cir. 1999), reprinted in the Appendix at p. 3a. The opinion of the Interior Board of Contract Appeals, dated December 4, 1997, entitled *Appeals of Alamo Navajo Sch. Bd., Inc. and Miccosukee Corp.*, IBCA No. 3463, 98-2 BCA 29,832, is reprinted in the Appendix at p. 22a.

JURISDICTION

The judgment of the Circuit Court sought to be reviewed was entered on October 29, 1999. This petition for certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statute at issue in this case is the Indian Self-Determination and Education Assistance Act, Title I, Public Law 93-638 (as amended), codified at 25 U.S.C. §§ 450 *et seq.* Specifically at issue are 25 U.S.C. § 450j-1(a), § 450j-1(b), and § 450j-1(f).

Also at issue is the Interior and Related Agencies Appropriations Act for Fiscal Year 1994, Pub. L. 103-138, 107 Stat. 1391 (Nov. 11, 1993). All are reprinted in the Appendix at pp. 75a-85a.

STATEMENT OF THE CASE

This appeal concerns the right of hundreds of tribal contractors throughout the country to be reimbursed for required administrative and overhead costs incurred while

providing services on behalf of the federal government under the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 25 U.S.C. §§ 450 *et seq.* (commonly referred to as the "ISDEAA"). The ISDEAA requires that tribal contractors such as the petitioner Miccosukee Corporation (Miccosukee) be reimbursed for contract support costs associated with ISDEAA contracts. Miccosukee entered into an Indirect Cost Agreement with the Secretary of the Interior for such costs. However, nine months after Miccosukee began performance of its contract and spent or committed most of its own costs, it was informed that it would not receive nearly 19 percent of its contractually agreed amount of reimbursement due to a shortfall in congressional appropriations. Miccosukee sought to enforce its contract right under the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*

The Interior Board of Contract Appeals (IBCA) upheld the right of Miccosukee to full reimbursement of its required contract support costs. *Appeals of Alamo Navajo Sch. Bd., Inc. and Miccosukee Corp.*, IBCA No. 3463 (Dec. 4, 1997), App. p. 22a, *reaff'd* (Mar. 2, 1998), App. p. 73a. The IBCA decision rests primarily on a long line of cases which hold the United States accountable in judgment to a contractor when an agreement is made to pay the contractor under a valid statutory authority, the contractor is to be paid out of general appropriations, and Congress fails to appropriate sufficient funds to pay what was agreed to under the contract.

On October 29, 1999, the Federal Circuit reversed the IBCA by adopting its decision in *Babbitt v. Oglala Tribal Pub. Safety Dept.*, 194 F.3d 1374 (Fed. Cir. 1999), App. p. 3a. In *Oglala Sioux*, the Federal Circuit ruled that the ISDEAA conditions the Secretary's authority to agree to reimbursement on the availability of appropriations so that if Congress fails to appropriate

a sufficient amount of funds, the contractor need not be reimbursed the full amount agreed to, even though the contractor is required by the ISDEAA to incur these largely fixed costs.

1. ***The ISDEAA and the Indirect Cost Agreement.***

The initial aim of the ISDEAA was to end the prolonged federal domination of Indian service programs while respecting and reinforcing the legal and moral responsibilities of the United States to the tribes and their members. The foundation of these unique responsibilities was explained by President Nixon, whose initial proposal for self-determination legislation became the ISDEAA:

> "The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. . . . For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans."

Special Message to the Congress on Indian Affairs, Pub. Papers 564 (Richard M. Nixon) 6 Pres. Doc. 894 (1970).

The government's century-long mismanagement and later effort to terminate these basic responsibilities and services left tribes and tribal people in deplorable social, economic, and political condition. President Nixon urged Congress to take the unprecedented step to reverse these conditions through the passage of self-determination legislation that would ". . . make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support." *Id.*

In 1975, Congress responded through passage of the ISDEAA, explaining that, "after careful review of the Federal government's historical and special legal relationship with, and resulting responsibilities to, American Indian people," it had determined that the Federal domination of Indian service programs had retarded the progress of Indians and tribes by denying them the opportunity to develop the leadership skills of self-government or have an effective voice in the planning and implementation of Indian programs. 25 U.S.C. § 450(a). As a result of these findings, Congress made an express declaration of its new federal Indian policy, first recognizing the "obligation of the United States" to assure maximum Indian participation in federal services so as to render them more responsive to the needs and desires of Indian communities, and second:

> ". . . its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, . . . the Indian people as a whole *through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people* in the planning, conduct, and administration of those programs and services."

25 U.S.C. § 450a(a), (b) (emphasis added); *see also* 25 C.F.R. § 900.3 (congressional and secretarial policy promoting self-determination).

In sum, the ISDEAA is intended to promote tribal administration of federal Indian programs through requiring the Secretary to enter into contracts with tribes to provide such programs to Indian people on behalf of the Federal government. Its express purpose is to acknowledge, rather than ignore, the special relationship between the United States and tribal Indians, and to carry out, rather than

disregard, the Federal government's obligations to them through the use of ISDEAA contracts.

Under these ISDEAA contracts, Indian tribes and tribal organizations are entitled to step into the shoes of the Secretary to take over administration of federal programs, services, functions, and activities that would normally be provided by the government for the tribe. 25 U.S.C. § 450f(a)(1). The Bureau of Indian Affairs ("Bureau" or "BIA") is the agency of the Department of the Interior which is responsible for implementing the ISDEAA and distributing funds to tribal contractors that perform services on behalf of the federal government. This is a multi-million dollar program with hundreds of such contracts entered into by tribes throughout the country every year.

Under the Act, the Secretary is required to provide program funding (direct costs) to a tribal contractor in an amount no less than the Secretary would have spent had he retained operation of the program. 25 U.S.C. § 450j-1(a)(1). In carrying out these federal programs, tribal contractors are also required to incur certain "contract support" costs, such as insurance and audit expenses. Since contracts under ISDEAA are cost-reimbursement contracts and do not allow contractors to make *any* profit on the contracts, contract costs not reimbursed by the government amount to a financial penalty on the contractors. Such penalties would discourage tribes to engage in contracting and thus defeat the primary goal of the Act. To address this concern, the ISDEAA requires that tribal contractors be reimbursed for their reasonable contract support costs. *See* 25 U.S.C. § 450j-1(a)(2) and § 450j-1(f), App. pp. 75a and 80a.

Based on procedures established by the Secretary, the reasonable amount of contract support costs the Secretary must provide to the contractor is usually determined by the annual negotiation of an "Indirect Cost Agreement"

between the tribal contractor and the Department of the Interior's Office of the Inspector General. This agreement, which the Secretary incorporates into the ISDEAA contract, sets an indirect cost rate which is used to determine the amount of contract support cost reimbursement payable to a contractor under the statute.[1]

The negotiation of an Indirect Cost Agreement usually takes place well before the contract's fiscal year begins and well before the amount of appropriations for that year are known. Thus, by the time the appropriations process is completed, most tribal contractors have already begun performance (necessarily incurring significant contract support costs) in order to prevent a disruption in vital program services. The timing of these events means the contractor is relying on the government to pay the costs agreed to before anyone knows the source of the appropriations by which they will be funded.

2. ***Congressional Policy on Contract Support Costs.***

Congress has repeatedly recognized the importance of contract support to the success of its Indian self-determination policy. In 1988, Congress significantly amended the ISDEAA to remedy the perennial problem of inadequate contract support cost funding which arose from agency budgeting. Congress stated "the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts." S. Rep. No. 100-274, at 8, *reprinted in* 1987 U.S.C.C.A.N. 2620, 2627. In support of these amendments, Congress declared that agencies

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1 Although the terms "contract support costs" and "indirect costs" are not necessarily interchangeable, the Bureau equates the two and carries out its contract support cost funding duties through an Indirect Cost Agreement.

must request an amount of funds that are "adequate to fully fund tribal indirect costs" and that agencies "must cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services." *Id.* at 12, *reprinted in* 1987 U.S.C.C.A.N. 2631. Congress announced its policy as to contract support costs: "*Full funding* of tribal indirect costs associated with self-determination contracts *is essential if the federal policy of Indian Self-Determination is to succeed.*" *Id.* at 13, *reprinted in* 1987 U.S.C.C.A.N. 2632 (emphasis added).

In furtherance of this policy, the Indian Self-Determination Act Amendments of 1988 added the mandatory contract support provision, 25 U.S.C. § 450j-1(a)(2), App. p. 75a (emphasis added), which states:

> "There *shall* be added . . . contract support costs which *shall* consist of an *amount for the reasonable costs* for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—
>
> "(A) normally are not carried on by the respective Secretary in his direct operation of the program; or
>
> "(B) are provided by the Secretary in support of the contracted program from resources other than those under contract."

Congress also added 25 U.S.C. § 450j-1(c)(2), which provides: "Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract." App. pp. 78a-79a.

3. *Appropriations and the ISDEAA.*

All of the costs of self-determination contracts are funded through appropriations. The Department of In-

terior Appropriations Act for FY 1993 and appropriations legislation in previous years contained no statutory limitation on the amount of appropriations available to pay the negotiated indirect costs of self-determination contractors.[2]

Late in the appropriations process for FY 1994, Congress expressed concern about the inability of the BIA to accurately forecast contract support need, but appeared prepared to fully fund the required amount. The Senate Committee Report stated:

> "The Committee is concerned by the significant shortfall which occurred for contract support in fiscal year 1993. Despite the BIA's efforts to adequately budget for contract support and the Committee's efforts to provide sufficient funding based on the information it receives, shortfalls continue to occur. With the increases the Committee recommends, the Committee believes the program should be adequately funded to avoid shortfalls in fiscal year 1994 . . . ."

S. Rep. No. 103-114, at 52 (1993).

When the budget was worked out in conference, the result changed dramatically. For the first time, Congress placed a cap on the amount available for contract support in the FY 1994 Interior Appropriations Act:

> "*Provided further*, That not to exceed $91,223,000 of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect

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[2] *See e.g.*, Pub. L. No. 102-381, 106 Stat. 1388 (Oct. 5, 1992). While there had been shortfalls in funding, none had been dramatic and most were made up through reprogramming of other agency funds. *See e.g.*, H.R. Rep. No. 102-505, at 16 (1992); Distribution of Fiscal Year 1994 Contract Support Funds, 58 Fed. Reg. 68694 (Dec. 28, 1993) ("the Bureau can no longer reprogram funds from other Bureau accounts to cover CSF shortfalls"); "Indian Self-Determination Act, Shortfalls in Indian Contract Support Costs Need to Be Addressed," GAO/RCED-99-150 p. 33 (June 1999).

costs associated with contracts or grants or compacts authorized by the Indian Self-Determination Act of 1975 . . . ."

Pub. L. 103-138, 107 Stat. 1391 (Nov. 11, 1993), App. p. 85a. Notably, however, Congress agreed to honor and fund the Indirect Cost Agreements entered into during FY 1993. H.R. Rep. No. 103-299, at 28 (1993).

4. ***The Miccosukee Corporation Contract.***

The Miccosukee Corporation, a tribal corporation chartered and controlled by the Miccosukee Tribe of Indians of Florida, is authorized to enter into contracts with the Secretary of the Interior under the ISDEAA and has been doing so for many years. Miccosukee was the first tribe to negotiate a contract to take over all BIA services in 1970 and served as a model for the enactment of the Indian Self-Determination Act in 1975.

Miccosukee operated 12 self-determination contracts in FY 1994. Miccosukee and the Inspector General negotiated for these contracts an indirect cost rate of 41.51 percent of the direct cost base. The Indirect Cost Agreement was signed on Sept. 29, 1993. At the time of the negotiations and signing, an appropriations cap on funding for contract support had never been imposed by Congress. At no point during the negotiations process did the parties consider the extent to which appropriations would be available. This was entirely reasonable under the circumstances since neither party knew that Congress would appropriate inadequate funds for contract support. The most the parties knew was how Congress or the BIA had acted historically with regard to its self-determination policy and appropriations, which, as noted above, was to make up for any appropriation shortfall through reprogramming. Furthermore, the record does not reveal that the parties specifically negotiated or discussed the possibility that the contract support costs as negotiated would not be fully funded.

Miccosukee proceeded to carry out its self-determination contracts as agreed to between the parties and based on its assumption that, consistent with the ISDEAA, its contract to be fully reimbursed for its indirect costs would be honored. At the very least, Miccosukee entered into the agreement unaware that, in the face of an appropriations shortfall, the Secretary would argue that the agreement was meaningless.

Congress enacted the appropriation cap on November 11, 1993, 43 days after the Miccosukee agreement was signed. At this time, it was not known whether there would be enough money available to fund all of the contract support payments agreed to by the government.

On December 28, 1993, the BIA issued a Notice in the *Federal Register*, Distribution of Fiscal Year 1994 Contract Support Funds, 58 Fed. Reg. 68694 (1993), which stated that in the event of a shortfall in its FY 1994 Contract Support Funds account, the Bureau would distribute an equal percentage of contract support funding to each self-determination contractor. On June 17, 1994, nine months after the Miccosukee Indirect Cost Agreement was signed, the Bureau notified self-determination contractors, including Miccosukee, that it would distribute funds sufficient to pay only 81.2106 percent of each contractor's negotiated contract support for FY 1994.

Miccosukee, of course, had been incurring contract support costs during the first nine months of its contracts with the expectation of reimbursement as was agreed to in its Indirect Cost Agreement. If Miccosukee had wanted to avoid the possibility of incurring costs in excess of what would be paid under appropriations, it would have had to shut down its programs until it learned how much it would be paid for contract support. Given suspension of these programs would cause adverse effects to its mem-

bers, the tribe proceeded, believing it would ultimately be paid based on its contractual agreement with the Secretary. However, once the reduced funding figure was announced, Miccosukee was notified that it had to absorb the ensuing cost of the appropriation shortfall or cut programs to make up for the difference.

In response to this Notice, on January 18, 1995, Miccosukee filed with its contracting officer a claim under the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, for $97,773 in indirect costs owed on its contract. On August 17, 1995, the contracting officer denied Miccosukee's claim. On December 18, 1995, Miccosukee filed a notice of appeal with the Interior Board of Contract Appeals (IBCA).

The IBCA held that Miccosukee was entitled to full funding, finding that (1) the Secretary had contractually agreed to fully reimburse Miccosukee for its required contract support costs under the valid authority of the ISDEAA which mandates full funding of such costs; and (2) Congress failed to take sufficient steps to amend or repeal that mandate or to direct the Secretary to modify the Indirect Cost Agreement or formula to conform to the appropriation cap.

The BIA moved for reconsideration on January 8, 1998. The IBCA granted the request to reconsider but reaffirmed its decision on March 2, 1998. The United States appealed to the Federal Circuit on October 27, 1999. The Federal Circuit overruled the IBCA's decision in *Oglala Sioux*, by interpreting the ISDEAA as conditioning the authority of the Secretary to contractually obligate the United States to reimburse tribal contractors for contract support only to the extent of available appropriations. 194 F.3d at 1379, App. at p. 11a.

REASONS FOR GRANTING THE WRIT

In its simplest terms, this case concerns the ability of a class—tribes who contract with the United States—to obtain payment for services rendered pursuant to their contractual agreements with the United States. At the heart of this case is every such contractor's ability to trust that its own government will deal fairly with it. The Federal Circuit has concluded that Congress, in intentional and unmistakable language, established a system for the Secretary of the Interior to contract with tribal governments to carry out the Secretary's responsibilities to those tribes, yet without any assurance to the tribes of payment for the services performed in accordance with the terms of the contract even by way of federal court adjudication.

The result of the Federal Circuit decision, which impacts hundreds of tribal contractors around the Country and annually involves tens-of-millions of dollars, is to shift the burden for a significant portion of these *federal program* costs onto the tribal contractors. This outcome is contrary to the plain language and policy of the ISDEAA as well as the Federal Circuit's own prior precedent. Resolution of this issue on a national basis is necessary to clarify the rights of tribal contractors under the ISDEAA in order to allow the federal policy of Indian self-determination to move forward on a sustainable basis. As the General Accounting Office observed in a recent report to Congress:

> "As contract support costs continue to increase, the tension between providing full funding for these costs and limiting them will increase as well. The issue has already reached an impasse, with tribes having initiated lawsuits on payment of contract support costs and the Congress having imposed a 1-year moratorium for fiscal year 1999 on new contracting under the Indian Self-Determination Act."

GAO/RCED-99-150 p. 8 (June 1999).

Should this Court choose not to correct the errant opinion below, the result will be another shameful episode in this Country's history in which the Federal Government has made solemn agreements with Indian tribes, only to abrogate them when it suits its convenience.

I. THE FEDERAL CIRCUIT HAS RE-WRITTEN THE ISDEAA, REVERSING THE ACCOMPANYING TWENTY-FIVE YEARS OF FEDERAL INDIAN POLICY ESTABLISHED BY CONGRESS BY MISINTERPRETING THE PLAIN MEANING OF THE "SUBJECT TO THE AVAILABILITY OF APPROPRIATIONS" LANGUAGE OF 25 U.S.C. § 450j-1(b).

As explained above, contract support costs are largely fixed costs that the ISDEAA requires tribal contractors to incur. Since failure to reimburse these costs would impose a financial penalty on tribal contractors (essentially creating an enormous unfunded federal mandate), the ISDEAA expressly directs that the Secretary of the Interior is both authorized and required to contractually obligate the United States to reimburse tribal contractors for their required contract support costs.

As noted above, these contracts must be negotiated well before the contract's fiscal year begins so that vital program services are not disrupted. In fact, tribal contractors like Miccosukee are carrying out the Secretary's responsibilities, and incurring contract support costs, well before the appropriations process is completed. This system is reasonable *only* if the contractor has some assurance that it will eventually receive the negotiated amount of contract support. Otherwise, contracting under the ISDEAA would be a high stakes gamble each year for the tribal contractor as to whether it will be forced to bear the costs of providing federal program services. The clearly stated intention of Congress in enacting the ISDEAA was to promote tribal self-determination but not to saddle the tribes with paying for these federal pro-

grams out of scarce tribal funds or to force tribes to cut back the programs for lack of funds.

In reversing the IBCA, the Federal Circuit has essentially rewritten the fundamentals of the statute by holding that although the Secretary of the Interior may contract in advance of appropriations, the ISDEAA limits his authority to obligate the United States to reimburse required contract support costs in excess of the amount eventually appropriated by Congress. This interpretation is contrary to both the plain language of the ISDEAA and clearly expressed congressional intent.

A. The ISDEAA Makes a Clear Distinction Between Contracting and Payment Authority.

Given the timing of the contracting process in relation to the appropriation process, the ISDEAA creates a distinction between the Secretary's contracting authority and payment authority. The ISDEAA authorizes and mandates the Secretary to contract for contract support costs when it provides:

> "There *shall* be added to the amount . . . contract support costs which *shall* consist of an amount for the reasonable costs for activities which *must* be carried on by a tribal organization as a contractor to ensure *compliance* with the *terms of the contract and prudent management* . . . ."

25 U.S.C. § 450j-1(a)(2) (emphasis added), quoted in full at App. p. 75a.[3]

Once the contract amount is determined, the ISDEAA mandates that "the Secretary *shall add to the contract the full amount of funds* to which the contractor is entitled undersubsection (a) . . . ." 25 U.S.C. § 450j-1(f), App. p. 80a (emphasis added).

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[3] Congress used the word "shall" which denotes a mandatory intent absent a convincing argument to the contrary. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

In providing a clear standard for determining the amount of reimbursement, the ISDEAA does not tie the reimbursement rate to the level of funding eventually appropriated by Congress. Rather, under 25 U.S.C. § 450j-1(a)(3)(A), App. pp. 75a-76a, the contractor is eligible "*for reasonable and allowable costs* of—

> (i) *direct program expenses* for the operation of the Federal program that is the subject of the contract, and
>
> (ii) any *additional administrative or other expense related to the overhead* incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." (emphasis added).

This language has been construed to mean that contract support costs are mandatory and the Secretary must provide them to contractors. *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996); *Shoshone-Bannock Tribes v. Shalala*, 988 F. Supp. 1306, 1331-32 (D.Or. 1997), *appeal filed* (9th Cir. 1999).

The ISDEAA, on the other hand, separately addresses the Secretary's disbursement authority.

> "*Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations* and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter."

25 U.S.C. § 450j-1(b), App. p. 78a (emphasis added).

This dichotomy is not unusual. The courts have long recognized a distinction in government contract law between the authority of a federal official to contractually obligate the United States to pay funds and his separate authority to disburse funds to liquidate that obligation. As this Court has explained:

> "Under [the normal system of program approval and authorization] it is not until the actual appropriation that the Government funds can be deemed firmly committed. Under the contract-authority scheme . . . before us now, there are authorizations for future appropriations but also *initial and continuing authority in the Executive Branch contractually to commit funds of the United States up to the amount of authorization*. The expectation is that appropriations will be automatically forthcoming to meet these contractual commitments. This mechanism considerably *reduces whatever discretion Congress might have exercised in the course of making annual appropriations*."

Train v. City of New York, 420 U.S. 35, 39 n.2 (1975) (emphasis added).

Although obligations incurred under contract authority are generally funded by subsequent appropriations, a failure by Congress to appropriate sufficient funds does not limit the government's liability to pay the amounts specified in the contract. As explained by the court in *New York Airways v. United States*, 369 F.2d 743, 752 (Ct.Cl. 1966):

> "[T]he failure of Congress or an agency to appropriate or make available sufficient funds does not repudiate the obligation; it merely bars the accounting agents of the Government from disbursing funds and forces the [contractor] to a recovery in the Court of Claims."

See also To the Chairman, House Committee on Merchant Marine and Fisheries, No. B-211190, 1983 WL 207412 (C.G.) (April 5, 1983) ("[T]he United States is obligated to pay under contracts where Government officials were statutorily authorized to enter into contracts in excess of or in advance of appropriations."). Thus, if Congress does not limit the contracting authority of a federal agency through use of a special appropriation act

(which facially limits the contracting authority to the amount provided in the special appropriation) or other limiting statutory language, the contractor may sue to enforce the contract and receive an award for contract damages.

This principle has been applied in a long line of government contract cases where the contractor is to be paid from a general appropriation. These cases have held that, so long as there is no limit on the federal agency's contracting authority, the contractor is entitled to recover against the United States for amounts due under the contract even if appropriations prove to be inadequate. As explained by the Court of Claims:

> "For years this court has made a distinction between contractors paid out of a general appropriation and those contracts for which a specific and limited appropriation is made by Congress. The former have been held not barred at all by exhaustion of the appropriation, on the theory that 'a contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, legal or illegal, to other objects.' "

Ross Constr. Corp. v. United States, 392 F.2d 984, 986-987 (Ct. Cl. 1968) (quoting *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)); *see also Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 553 (Ct. Cl. 1980); Office of the General Counsel, U.S. General Accounting Office, *Principles Of Federal Appropriations Law*, Ch. 6, p. 18 (2d ed. 1992) ("If . . . a contract is but one activity under a larger appropriation, it is not reasonable to expect the contractor to know how much of that appropriation remains available for it at any given time. A requirement to obtain this information would place an unreasonable burden on the contractor, not to mention a nuisance for the government as well.").

B. The Court of Appeals Incorrectly Determined That the ISDEAA Facially Limits the Secretary's Contracting Authority.

The Federal Circuit largely ignored the distinction between contracting and payment authority. Instead, the court simply concluded that the ISDEAA, on its face, limits the authority of the Secretary to obligate the United States to reimburse contract support costs in excess of the amount appropriated by Congress.

To support this conclusion, the court relied on the proviso in 25 U.S.C. § 450j-1(b), quoted above, which makes "the provision of funds . . . subject to the availability of appropriations . . . ." However, the plain language of this proviso does not support the conclusion reached by the court. As this Court has noted, "the plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

In the instant case, the proviso clearly states that "the *provision of funds* . . . is subject to the availability of appropriations *and* the Secretary is not required . . ." to reduce funding for services to one tribe "to make funds available" to another tribe under the ISDEAA. (Emphasis added). It is difficult to see how "the provision of funds" being subject to the availability of appropriations could be read any other way than as referring to a limitation on the Secretary's disbursement authority, not on his contracting authority.[4] It perhaps forces the contractor to a recovery in the Court of Claims, *New York Airways,*

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[4] "Provision" is the providing, preparing, or supplying of something. Webster's New World Dictionary, Third College Edition, at 1083. "Distribution" is the act or process of apportioning or giving out. Black's Law Dictionary, Seventh Edition, at 488.

supra p. 16, but it does not defeat his entitlement. In simple terms, the proviso can be restated as follows:

> "The Secretary's distribution [provision] of funds under the ISDEAA is subject to the availability of appropriations; therefore, the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe in order to distribute funds [make funds available] to another tribe or tribal organization under the ISDEAA."

This interpretation is the most logical one and is in line with the general appropriation principles discussed above at pp. 15-17 and the *New York Airways* case. If there is contracting authority from a general appropriation, and the contract is entered into without regard to a specific appropriation amount, then the contract obligation stands, even if Congress fails to appropriate the funds. The Secretary, however, need not distribute the amount if he does not receive an adequate appropriation.

These rules are directly applicable to the situation at hand. As provided under the statute, the Secretary negotiated a contract with Miccosukee prior to appropriations for a specified amount of contract support. The money appropriated for contract support costs in the FY 1994 Appropriations Act was a general appropriation, meant for disbursement to multiple contractors. *See Ross Construction*, 392 F.2d at 986-87. The Bureau did not calculate the *pro rata* distribution or make its final FY 1994 contract support cost distribution until June of that year. At the beginning of its contract year, therefore, Miccosukee did not know that only a percentage of its contract support could be recouped from that pool, much less the actual percentage. Nor could Miccosukee have foreseen that the amount appropriated would be wholly insufficient. Under the general appropriation cases, Miccosukee is entitled to a judgment for the amount owed.

Indeed, recognizing that the appropriations process might not permit tribal contractors to fully recover their

contract support costs, the ISDEAA expressly provides that contractors may enforce the terms of their contracts against the United States in suits for money damages. 25 U.S.C. § 450m-1 (allows for claims "against the Secretary for money damages arising under contracts authorized by this subchapter."). Thus, should appropriations be inadequate, contractors are permitted to recover their contract support through a judgment against the United States for money damages to be paid out of the permanent Judgment Fund in the United States Treasury. *Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563 (1997) (judgment fund is an appropriation from which contract obligations authorized by law are to be paid in the absence of any other appropriation).

But the Federal Circuit found the proviso language to be an express condition on the Secretary's *contracting* authority. *Oglala Sioux*, 194 F.3d at 1379, App. p. 11a. In fact, the court clearly confused the two concepts when, in rejecting the Tribe's request to look at the broader context and intent of the ISDEAA to interpret subsection (b), it cited *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1170-71 (Fed. Cir. 1995) (citing the Anti-Deficiency Act), and *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1348-49 (D.C. Cir. 1996). Each of these cases stand for the proposition that, consistent with the Anti-Deficiency Act, 31 U.S.C. § 1341, the Secretary may not *disburse* more funds than Congress appropriates at a given time.

The Tribe has not argued otherwise. The Tribe asserts that the proviso in question is a restatement of this limitation on the Secretary's disbursement of funding, which explains why Congress, in the latter segment of the proviso, does not require the Secretary to take funds from other tribes "to make funds available" under the ISDEAA for contracting tribes. The decision by the D.C. Circuit in *Ramah Navajo Sch. Bd.* is indeed instructive as to the proviso:

> "The real purpose of the proviso is quite different when read in context of the entire Act. Given the mandatory terms of the Tribes' [contract support fund] entitlement under the Act, Congress clearly included the proviso *not to excuse the Secretary's obligation* to follow the mandates of the statute, *but rather to make evident that the Secretary is not required to distribute money if Congress does not allocate that money to him under the Act.*"

87 F.3d at 1345 (emphasis added). Thus, these cases deal only with the disbursement of funds under the ISDEAA and in no way support the Federal Circuit's determination that the Secretary's *contracting* authority is limited by the proviso.

C. The Rules of Statutory Construction Require That the ISDEAA Be Interpreted to Allow Tribal Contractors to Judicially Enforce Their Contractual Agreements With the Secretary.

The Federal Circuit's interpretation of the proviso renders the mandatory directives on reimbursement of contract support costs meaningless in the face of an appropriations shortfall by placing a tribe in the position of administering programs on the Secretary's behalf and incurring administrative costs for which it may or may not be reimbursed, despite entering into an indirect cost agreement with the Secretary as authorized by section 450j-1(a)(3)(B) for such reimbursement. The Tribe's more limited view, that the proviso refers only to the Secretary's duty of disbursement, preserves the congressional directives while simultaneously giving effect to the proviso. Relegating a contractor to his Court of Claims remedy may be awkward, but it avoids a complete abrogation of the contract.

At most, the proviso might be considered to be ambiguous. However, any ambiguity is resolved by reference to the rules of statutory construction. In the 1994 amendments to the ISDEAA, Congress expressly mandated that

the ISDEAA "and each provision of this Contract shall be *liberally construed for the benefit of the Contractor to transfer the funding* and the following related functions, services, activities, and programs. . . ." 25 U.S.C. § 450*l* (c)(1)(a)(2) (emphasis added).

Moreover, "The cardinal principle of statutory construction is to save and not to destroy," *National Labor Relations Bd. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937), or rather, "to make sense rather than nonsense of the *corpus juris*." *West Virginia Univ. Hospital, Inc. v. Casey*, 499 U.S. 83, 101 (1991). Statutory construction is a "holistic endeavor," in which a court "must not be guided by a single sentence or member of a sentence, but [by] the provisions of the whole law, and to its object and policy." *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (citations omitted); *see Lexecon*, 523 U.S. at 37 (central tenet of statory interpretation is that a statute be considered in all its parts when construing any one of them). Furthermore, the literal interpretation of the words of an act should not prevail where it would produce an absurd result and an alternative interpretation consistent with the legislative purpose is available. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

Thus, the Federal Circuit had a responsibility to harmonize the proviso with the general purpose and intent of the entire statutory scheme. *Carchman v. Nash*, 473 U.S. 716 (1985) (the literal interpretation should not prevail at the expense of the spirit of the act); *Harrison v. Northern Trust Co.*, 317 U.S. 476 (1943) (the manifest reason and obvious purpose of the law should not be sacrificed to a literal interpretation of the words therein.) Instead, the court nullified the purpose and intent of the ISDEAA in order to support is view of the proviso, while expressly conceding the tension between the two: "[the Tribe] asks

this court to use the general intent underlying the ISDA to trump the express language of the statute." *Oglala Sioux*, 194 F.3d at 1378, App. p. 8a. But as we point out above, what the court said was "express" was not the "express" meaning of the language. It is merely one interpretation of that language and not the most natural one.

As explained above, Congress has referred to the BIA's failure to provide contract support to tribal contractors as "[p]erhaps the single most serious problem with implementation of the Indian self-determination policy. . . ." S. Rep. No. 100-274, at 8, *reprinted in* 1987 U.S.C.C.A.N. 2631. Accordingly, Congress directed that agencies request an amount of funds "adequate to *fully fund* tribal indirect costs" and "cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services." *Id.* at 12, *reprinted in* 1987 U.S.C.C.A.N. 2631 (emphasis added). Congress' view with regard to the importance of contract support funding in carrying out its self-determination policy could not have been more firmly expressed than when it explained:

> "The Federal Government would not consider it proper to shortchange funding for contracts with private suppliers of goods and services. When the Bureau of Indian [A]ffairs and the Indian Health Service contract with Indian tribes, however, they routinely fail to reimburse tribes for legitimate administrative costs associated with carrying out federal responsibilities. *Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.*"

Id. at 13, *reprinted in* 1987 U.S.C.C.A.N. 2632 (emphasis added).

In fact, during the administration of the Tribe's contract for the period in question, the Secretary was expressly re-

quired to provide annual detailed reports to Congress concerning contract support cost funding, including "an accounting of any deficiency of funds needed to provide required contract support costs to all contractors for the current fiscal year." 25 U.S.C. § 450j-1(c)(2) (repealed 1998).

In contrast, the proviso was added in the final House revision of the ISDEAA amendments, S. 1703, in what the House manager described as "mostly a technical rewrite" for which the "more important changes" would be noted. 134 Cong. Rec. H7366-04, 1998 WL 175429 (Sept. 9, 1988). There was no mention of the proviso at all, much less as an important change. Obviously, at the time of its adoption, the proviso was not considered as a significant limitation on the other contract support language being adopted.

Given that there is a legitimate reading of the statute as proposed by Miccosukee which is supported by the substantial legislative history and clear purpose of the law, the Federal Circuit decision should be reviewed and reversed.

D. The Court of Appeals' Decision Rewrites the Policy of the ISDEAA.

The Federal Circuit's decision turns not only the contract suport provisions but the entire ISDEAA on his head. Under the decision, the entire burden of funding the contract suport costs associated with administering an ISDEAA contract could be shifted to the contracting tribe. Viewing the statute as a whole, Congress did not intend that a tribe be required to gamble with regard to whether or not it would be paid for administering services for which the Federal Government is otherwise responsible. When it became apparent that the agencies were only partially funding tribes' contract support costs, which Congress viewed as contrary to the self-determination policy, it enacted the mandatory contract support funding and reporting provisions.

The Federal Circuit decision removes any incentive for the Secretary to provide accurate budget information to Congress on contract support cost needs so that tribes can be properly funded such costs because, under the decision, neither the Secretary nor the United States is liable for any shortfall, regardless of services rendered. Furthermore, the decision takes away the primary incentive for tribes to contract under the ISDEAA because of the overwhelming likelihood that a tribe will have to reduce direct program funding and, in turn, services to its members, in order to cover contract support cost, despite having negotiated an indirect cost agreement for such costs. The Tribe would be better off leaving these programs in the hands of the government so that they are better funded. Yet, this result directly contradicts Congress' declared policy of self-determination designed to promote the transition of federal programs from federal to tribal administration, and ultimately, tribes' ability to make their way without massive federal support.

One reason for the court's refusal to consider the intent of the ISDEAA as a whole, or the intent of the contract support reimbursement provisions therein was that, in its view, this would render the proviso meaningless and amount to a legislative repeal, exceeding the court's judicial function. *Oglala Sioux*, 194 F.3d at 1378-79, App. pp. 9a-10a. Yet, as explained above, there was available to the court an alternative reading of the language (limiting only the Secretary's authority to disburse funds) which would preserve the proviso *and* conform to the intent of the ISDEAA. Where statutory language may be construed two ways, one which will carry out the general intent of the act and one which will defeat it, the former interpretation should be given effect. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949).

Besides the court's failure to preserve the ISDEAA's purpose, the court determined that its interpretation of

the proviso did not lead to an absurd result for the tribes before it. The court specifically concluded that the Oglala Sioux Tribal Public Safety Department's failure to receive over eight percent of its contract support costs as a result of the court's reading of the proviso was not plainly unreasonable. *Oglala Sioux,* 194 F.3d at 1379, App. p. 10a. To the contrary, it is inherently unreasonable to enter into an agreement to pay an amount for the reasonable costs of contract support activities, agree on what the reasonable amount is, and then only pay a lesser percentage of that amount.

Moreover, even assuming Oglala's receipt of 91.74 percent of its contract amount could be viewed as reasonable, Miccosukee received less than 82 percent of its indirect cost agreement amount. Furthermore, unlike Oglala, whose claim was for FY 1995, Miccosukee's loss in FY 1994 was unexpected since it was the first year Congress capped the amount of appropriations available for contract support. *The court failed to acknowledge these vital factual distinctions between the two parties.*

In sum, the court's decision contradicts the entire self-determination statutory scheme and its underlying policy by rendering the contractual agreement between the Tribe and the Secretary meaningless, though services have been rendered. The court could have taken a view of the proviso that would have preserved congressional intent and give effect to the proviso, but chose to destroy, rather than to preserve.

II. THE COURT OF APPEALS' DECISION IS CONTRARY TO ITS OWN PRECEDENT.

The relevant provisions of the ISDEAA are legally indistinguishable from those considered in *New York Airways,* 369 F.2d 743 (Ct.Cl. 1966) a decision rendered by the Court of Claims, the Federal Circuit's predecessor over 30 years ago. In that case, the Court of Claims held that a contractor was entitled to a judgment for what was

owed under a contract in circumstances similar to the case at hand.

The statute at question in *New York Airways* (the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*) granted to the federal agency both the authority and obligation to "determine . . . the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith." *Id.* at 745, n.2 (quoting 49 U.S.C. § 1376(a)). Payments under these rate agreements were restricted to specific "appropriations made to the Board for that purpose." *Id.* at 745 (quoting 49 U.S.C. § 1376(c)).

The court found that the Board's *contracting authority* to set rates was not expressly tied to the availability of appropriations, and therefore the rate agreements were binding on the United States, even in the absence of adequate appropriations. According to the court, "Congress would have been required to incorporate into section 406 of the Act [the Board's rate-making authority] . . . suitable terminology restricting the Board's authority to set rates under section 406 beyond available appropriations." *Id.* at 749. Having failed to do so, the court concluded that the contractors were entitled to a judgment to enforce their rate agreements. *Id.* at 752.

Yet, the Federal Circuit declined to follow this precedent. According to the court of appeals:

> "*New York Airways* involved a situation in which the Government, as a contracting party, had simply failed to appropriate and pay its unqualified contractual obligation. Oglala's situation differs fundamentally in that the ability of Interior to bind the Government contractually was expressly conditioned on the availability of appropriations."

Oglala Sioux, 194 F.3d at 1379.

But as discussed above, the only limitation imposed by the ISDEAA is on the Secretary's ability to disburse payments under these agreements in advance of congressional appropriations. The proviso only refers to "the provision of funds" and does not reference the Secretary's separate authority to contractually obligate the United States to fully reimburse tribal contractors for their required contract support costs. Moreover, Congress took no action in FY 1994 to limit the Secretary's contracting authority. As noted above, in the legislative history to the FY 1994 apropriations, Congress stated its affirmance of the contract support system.

Just as occurred in *New York Airways,* Congress did not repudiate the contracts entered into between the Secretary and the contracting tribes. Indeed, the FY 1994 appropriation was over $33 million dollars more than the amount requested by the Bureau for contract support costs in the previous year. As also happened in *New York Airways,* while Congress alerted the BIA that a shortfall might occur, it did not instruct the BIA to change the manner in which Indirect Cost Agreements were to be negotiated nor did Congress indicate that a shortfall would not be funded in the next year. In fact, the very next year, Congress specifically affirmed the contract support cost negotiation process. Sen. Rep. No. 103-294 at 57 (1994) ("These shortfalls should be treated as one-time occurrences and should not have any impact on determining future indirect cost rates.").

Thus, the Court of Apeals erred when it distinguished *New York Airways.* The cases are virtually identical and the Federal Circuit failed to follow its own precedent or to state an intention to overturn its previous decision.

III. THE COURT OF APPEALS' INTERPRETATION VIOLATES THE INDIAN CANON OF CONSTRUCTION.

Finally, to the extent that there is any ambiguity in the relevant provisions of the statute, or if there is any doubt as to the intentions of the parties in interpreting this contract, Congress has expressly dictated the manner in which each should be construed. Consistent with the long-standing statutory rule of construction that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians," *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918)), Congress specifically requires that interpretation of each provision of the ISDEAA and of the contract must follow this rule, 25 U.S.C. § 450*l*(c)(1)(a)(2). *See above* pp. 21-22. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 455, 1461 (10th Cir. 1997) (interpreting the contract support provision under this canon).

Furthermore, it is hornbook law that "[b]ilateral contracts should be applied, if fairly possible, so as not to put one side at the mere will or mercy of the other." *C. H. Leavell & Co. v. United States*, 530 F.2d 878, 891 (Ct. Cl. 1976). The Court of Appeals' interpretation of the available appropriations provision would do just that—leave Miccosukee completely at the mercy of the government to determine funding levels after contract performance has begun. This certainly was not what Congress intended. Miccosukee's interpretation of the provisions, on the other hand, conforms to the intent of the ISDEAA and is guided by the controlling case law on the issue, as stated in *New York Airways*, *Ferris* and *Ross Construction*. *See also United States v. Seckinger*, 397 U.S. 203, 212 (1970) (courts are particularly loathe to interpret against contractors where "there is a vast disparity in bargaining power and economic resources be-

tween the parties, such as exists between the United States and particular contractors.").

The IBCA was correct when, in relying on the general appropriation line of contract cases, it stated: "Surely, all the Indian tribes can be expected to know are the indirect cost percentages by which their entitlements are to be multiplied under the contract and grant agreements they have signed with the BIA in accordance with the formulas that Congress itself previously prescribed—indeed, previously mandated." IBCA Decision, p. 33, App. p. 52a. The Board concluded:

> "The very fact that Miccosukee's CSC contract restated the cautionary language that it was subject to the availability of appropriations clearly illustrates why the courts over the years have refused to place the full burden of general appropriations shortfalls and subsequent earmark limitations on the private parties who deal with, and justifiably rely on, the Government to do what, pursuant to an authorizing Act, it has said it will do. *Otherwise, the Government's contractual promises would become a mere sham.*"

IBCA Decision, p. 50, App. p. 69a (emphasis added).

CONCLUSION

Based on the arguments presented above, this Court should grant Miccosukee's petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 98-1457

BRUCE BABBITT, Secretary of the Interior,
Appellant,

v.

MICCOSUKEE CORPORATION,
Appellee.

Oct. 29, 1999

Before MICHEL, PLAGER, and GAJARSA, Circuit Judges.

PLAGER, Circuit Judge.

Bruce Babbitt, Secretary of the Interior ("Government" or "Interior") appeals the decision by the United States Department of the Interior Board of Contract Appeals ("IBCA" or "Board") granting summary judgment in favor of Miccosukee Corporation ("Miccosukee"). *See Appeals of Alamo Navajo Sch. Bd., Inc. & Miccosukee Corp.*, IBCA No. 3463, 98-2 BCA 29,832 (Interior B.C.A. Dec. 4, 1997).[1] The IBCA awarded Miccosukee

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[1] Before the IBCA, Miccosukee appealed the contracting officer's denial of full-funding of its contract support costs, as well as the denial of full-funding of its administrative cost grant ("ACG") for school operations programs. The Board consolidated Miccosukee's appeals with those of Alamo Navajo School Board, Inc., who claimed entitlement to full-funding of its ACGs for its school pro-

full-funding of indirect (contract support) costs on its 1994 fiscal year self-determination contracts under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450j-1 (1994). Because this case turns on the same issue of statutory interpretation of the ISDA as the companion case to Miccosukee, *see Interior v. Oglala Sioux*, No. 99-1033 (Fed. Cir. ——, 1999), decided today, we reverse both the IBCA's grant of summary judgment to Miccosukee, as well as the Board's denial of the Government's motion for summary judgment, for the reasons stated in that opinion.

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grams. In this appeal, the Government is only contesting the Board's ruling as to contract support costs; thus, Miccosukee is the only appellee before this court.

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 99-1033

BRUCE BABBITT, Secretary of the Interior,
Appellant,

v.

OGLALA SIOUX TRIBAL PUBLIC SAFETY DEPARTMENT,
Appellee.

Oct. 27, 1999

Gajarsa, Circuit Judge, issued separate opinion.

Before MICHEL, PLAGER, and GAJARSA, Circuit Judges.

Opinion for the court filed by Circuit Judge PLAGER. Additional views filed by Circuit Judge GAJARSA.

PLAGER, Circuit Judge.

The United States Department of the Interior Board of Contract Appeals ("IBCA" or "Board") granted summary judgment against Bruce Babbitt, Secretary of the Interior ("Government" or "Interior"), and in favor of Oglala Sioux Tribal Public Safety Department ("Oglala"). *See Appeal of Oglala Sioux Tribal Pub. Safety Dep't*, IBCA No. 3680-97, 98-2 BCA 29,833, 1998 WL 347090 (Interior B.C.A. June 24, 1998). In its appeal to the

Board, Oglala claimed entitlement to all of its indirect (contract support) costs on its 1995 fiscal year self-determination contracts under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. §§ 450-450n (1994); Interior had provided only about 92% of the contract amount for such costs due to a shortage in congressional appropriations. The IBCA concluded that Oglala was entitled to full funding. The Board reasoned that Interior was legally bound to provide Oglala with full indirect costs notwithstanding Congress's reduced lump sum appropriation for ISDA contracts and an express congressional cap on funds for indirect costs. Because the ISDA explicitly makes funding of ISDA contract indirect costs subject to the availability of appropriations, and because Interior had no choice but to comply with the statute, we reverse the decision of the Board and remand the case.

BACKGROUND

This appeal is one of a number of disputes stemming from the ISDA. The ISDA's stated purpose is to allow Native American tribes to operate their own federal programs directly. Under the ISDA, a tribe and the Secretary of the Interior enter into a "self-determination contract," which incorporates the provisions of the model contract contained in the ISDA text. *See* 25 U.S.C. § 4501(a), (c) (1994). The ISDA requires the Department of the Interior's Bureau of Indian Affairs ("BIA") to fund programs (base funding) and to fund indirect costs to self-determination contractors. The indirect cost rate is determined by annual negotiations with the Department of the Interior's Office of the Inspector General. The resulting rate is multiplied by the total direct cost base of a contractor's contracts for a particular fiscal year to calculate the indirect cost amount. Funding of

ISDA contracts is dependent upon congressional appropriations.

Appellee, Oglala Sioux Tribal Public Safety Department, is a tribal organization which operates an ISDA contract for public safety on the Pine Ridge Reservation in South Dakota for the Oglala Sioux Tribe. Oglala has a multi-year ISDA contract with the BIA. For fiscal year 1995, Oglala incurred indirect costs of $1,313,840. Some of these indirect costs were expended prior to congressional appropriations for the fiscal year.

For fiscal year 1995, Congress appropriated $1.5 billion for the operation of Native American programs, "of which not to exceed $95,823,000 shall be for payments . . . for contract support costs" for contracts authorized by the ISDA. See Interior Appropriations Act of 1995, Pub.L. No. 103-332, 108 Stat. 2499, 2511 (1994). Due to the cap in funding of contract support costs, the Secretary implemented a plan to allocate the available funds. *See* Distribution of Fiscal Year 1995 Contract Support Funds, 59 Fed.Reg. 55318 (1994). In the end, tribes that submitted timely proposals all received 91.74% of their indirect costs. Oglala received 91.74%, which was $108,506 less than the originally negotiated amount. After the contracting officer denied Oglala's claim for full funding of indirect costs, Oglala appealed to the IBCA.

The IBCA granted summary judgment to Oglala after the Government failed to show cause why this case differed from *Appeals of Alamo Navajo Sch. Bd., Inc., Miccosukee Corp.*, IBCA No. 3463, 98-2 BCA 29,832, 1997 WL 759441 (Interior B.C.A. Dec. 4, 1997), which involved the same legal issue.[1] In *Miccosukee*, the IBCA

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[1] The appeals in both cases were heard together, and are decided together today. Before the IBCA, Miccosukee appealed the con-

concluded that Interior was legally bound by the ISDA contracts to provide full indirect cost funding, despite specific congressional limitations on appropriations for indirect costs. *See Miccosukee*, No. 3464, slip op. at 45. The IBCA reached this conclusion on the basis of its reading of the ISDA and case law, independent of the Government's trust responsibilities to Native Americans. *See id.* at 51-52. Although Oglala's indirect costs suit involves a different fiscal year than that in *Miccosukee*, the IBCA reasoned that minor factual differences between the two cases failed to raise a genuine issue of material fact that would preclude summary judgment against the Government based on *Miccosukee*. *See Appeal of Oglala Sioux Tribal Pub. Safety Dep't*, No. 3680-97, slip op. at 2.

The Government appeals the IBCA's grant of summary judgment for Oglala. We have jurisdiction to hear this appeal under 28 U.S.C. § 1295 (1994).

DISCUSSION

The grant of summary judgment is reviewed as a matter of law, to determine that no genuine issues of material fact exist when the record is read in the light most favorable to the non-moving party, and that the moving party is otherwise entitled to judgment on the law. *See Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1107 (Fed.Cir. 1992). Conclusions of law are reviewed independently and without deference,

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tracting officer's denial of full funding of its contract support costs, as well as the denial of full funding of its administrative cost grant ("ACG") for school operations programs. The Board consolidated Miccosukee's appeals with those of Alamo Navajo School Board, Inc., who claimed entitlement to full funding of its ACGs for its school programs. In Miccosukee, the Government is only contesting the Board's ruling as to contract support costs; thus, Miccosukee is the only appellee in that case.

see Orlando Helicopter Airways, Inc. v. Widnall, 51 F.3d 258, 262 (Fed.Cir. 1995); though, of course, we give careful consideration to the Board's legal conclusions in recognition of its "considerable expertise in construing government contracts," *West v. All State Boiler, Inc.*, 146 F.3d 1368, 1371 (Fed.Cir.1998).

On appeal the Government argues that Oglala has no statutory or contractual right to additional funding for its contract support costs because under the ISDA the requirement to fund such costs is subject to the availability of appropriations. As in any case of statutory interpretation, we begin with the language of the statute, specifically, 25 U.S.C. § 450j-1 (1994), entitled "Contract funding and indirect costs." Subsection (a) describes the amount of funds to be provided. For example, Interior is obligated to provide direct costs "not less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . for the period covered by the contract." 25 U.S.C. § 450j-1(a)(1) (1994). In addition, Interior must supply "contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management. . . ." *Id.* § 450j-1(a)(2). The following subsection, 450j-1(b), describes reductions and increases in the amount of funds provided. This subsection concludes with the unequivocal statement that: "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations . . . ." *Id.* § 450j-1(b) (emphasis added).

The language of § 450j-1(b) is clear and unambiguous; any funds provided under an ISDA contract are "subject to the availability of appropriations." The clause preceding this limitation, "[n]otwithstanding any other provision

in this subchapter," further clarifies that other statutory language in the ISDA relied upon by Oglala, *see, e.g.*, § 450j-1(f) ("Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a)."), cannot trump this express restriction on ISDA funding.

Other sections of the ISDA indicate congressional intent to make ISDA funding subject to the availability of appropriations. For example, § 450j(c) sets the term of self-determination contracts and states "[t]he amounts of such contracts shall be subject to the availability of appropriations." Likewise, the model contract set out in the ISDA, which is contained in or incorporated by reference into each self-determination contract under the ISDA, specifies that "[s]ubject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement. . . ." *Id.* § 4501(c).

Oglala asks this court to use the general intent underlying the ISDA to trump the express language of the statute. There are two problems with following such an approach.

First, in the face of congressional under-funding, an agency can only spend as much money as has been appropriated for a particular program. *See Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1170-71 (Fed.Cir.1995) (citing 31 U.S.C. § 1341(a)(1)(A) (1994)). Thus, Interior properly allocated the $95,823,000 earmarked for contract support costs by giving eligible self-determination contractors 91.74% of their indirect costs. *See Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1348-49 (D.C.Cir. 1996) (explaining how a *pro rata* reduction scheme would

effectuate the original statutory scheme of the ISDA and comply with congressional intent behind the 1995 Appropriations Act).

Second, if we accepted Oglala's selectively quoted legislative history as a clear congressional statement of intent that ISDA indirect costs must be fully funded, it would render the subject-to-appropriations language of § 450j-1(b) meaningless. It would exceed our judicial function to repeal the unambiguous language of § 450j-1(b) in such a fashion. *See West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991) ("The best evidence of [congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous . . . we do not permit it to be expanded or contracted by the statement of individual legislators or committees during the course of the enactment process."); *cf. Iselin v. United States*, 270 U.S. 245, 250-51, 46 S.Ct. 248, 70 L.Ed. 566 (1926) (reasoning that to supply an omission in a statute whose language was plain and unambiguous would transcend the judicial function). Instead, we must assume that Congress "says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, . . . 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (internal citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981)); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (applying the rule that if the statute's language is plain, then the "sole function of the courts is to enforce it according to its terms" (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct.

192, 61 L.Ed. 442 (1917))); *American Tel. & Tel. Co. v. United States*, 177 F.3d 1368, 1379-81 (Fed.Cir. 1999) (*en banc*) (Plager, J., dissenting-in-part). Furthermore, we decline to find that Interior's *pro rata* allocation of the capped appropriations providing Oglala 91.74% of its indirect costs for 1995 constitutes an absurd result. *See United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269, 277, 49 S.Ct. 133, 73 L.Ed. 322 (1929) (enforcing the plain meaning of the provision since it leads to nothing impossible or plainly unreasonable).

The Supreme Court has cautioned, with respect to the interpretation of treaty language, that "[t]he canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 505-06, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986). Thus, even if we were to construe the agreement between Interior and the Oglala Tribe as analogous to a treaty, in the absence of ambiguity the agreement "must be interpreted according to [its] natural and ordinary significance," and only if the words are ambiguous, "then resort may be had to such evidence, written or oral, as will disclose [the parties' intent]." *United States v. Choctaw Nation*, 179 U.S. 494, 531, 21 S.Ct. 149, 45 L.Ed. 291 (1900). No such ambiguity exists here.

Oglala relies upon *New York Airways, Inc. v. United States*, 177 Ct.Cl. 800, 369 F.2d 743 (1966), to support its contention that it is entitled to full funding of contract support costs regardless of any congressional appropriation caps. New York Airways sued the Government for money allegedly due for transporting mail by helicopter. *See id.* at 744. As a certified carrier of mail,

New York Airways was statutorily entitled to receive reasonable compensation in the form of fixed monthly payments, but funds earmarked for the mail service had been exhausted for the fiscal year, leaving New York Airways with an unpaid balance. *See id.* The *New York Airways* court concluded that the "mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." *Id.* at 748 (citing *United States v. Vulte*, 233 U.S. 509, 49 Ct.Cl. 687, 34 S.Ct. 664, 58 L.Ed. 1071 (1914)). *New York Airways* involved a situation in which the Government, as a contracting party, had simply failed to appropriate and pay its unqualified contractual obligation. Oglala's situation differs fundamentally in that the ability of Interior to bind the Government contractually was expressly conditioned on the availability of appropriations.

The D.C. Circuit reached the same conclusion in *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1341-42, 1345 (D.C.Cir.1996) ("*Ramah I*"). The *Ramah I* court discussed § 450j-1(b) of the ISDA as part of its analysis of how much discretion the Secretary had to allocate indirect funds with respect to the 1995 congressional cap on the appropriation amount available for ISDA contract support costs. The court noted that the Secretary is "not required to distribute money if Congress does not allocate that money to him under the Act. The first part of the provision [§ 450j-1(b)] says just that. . . ." *Id.* at 1345. The court then concluded that despite a tribe's claim that it is entitled to the funds under the ISDA, if the money is not available, it need not be provided. *See id.* Thus, the D.C. Circuit found the language of § 450j-1(b) as clear as we do. *See id.* ("Thus, we read the subject-to-availability-of-funds provision to

mean precisely what it says: the Secretary need only distribute the amount of money appropriated by Congress under the Act. . . .").[2]

Oglala responds with a Tenth Circuit case in which the court concluded that self-determination contractors are entitled to full funding for all reasonable and necessary contract support costs. *See Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1463 (10th Cir. 1977) ("*Ramah II*"). But the shortfall in *Ramah II* was caused by Interior's Office of the Inspector General's inclusion of state program funds in the plaintiff's direct costs base for five self-determination contracts, which resulted in a lower (44.5%) indirect costs rate than the 48.1% rate that plaintiff had calculated (by excluding the state program funds). *See id.* at 1459. The *Ramah II* court reasoned that the inclusion of these state program funds in the direct cost base was improper because the state program funds did not include funding for indirect costs. *See id.* at 1463. Thus, the *Ramah II* court's holding only specifically prohibits adverse adjustments to the calculation of ISDA indirect costs stemming from non-funding of indirect costs by other state or federal agencies and does not address the problem in this case—congressional under-appropriation of funds.

Oglala further argues that it relied to its detriment (by spending indirect cost money before it was appropriated) on the expectation that it would receive full indirect costs funding based on the entitlement language of ISDA § 450j-1(g). Such an estoppel claim requires that Oglala prove that its reliance was reasonable. *See Heckler v. Community Health Servs.*, 467 U.S. 51, 59,

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[2] The ultimate outcome in Ramah I turned on the validity of the Secretary's 1995 allocation plan for the limited amount of indirect cost money available.

104 S.Ct. 2218, 81 L.Ed.2d 42 (1984) (citing Restatement (Second) of Torts § 894(1) (1979)). Although Oglala may have expected to receive full funding of such costs based on past experience, the subject-to-availability-of-appropriations language present in § 450j-1(b) as well as in the model contract, § 4501(c), precludes a finding that Oglala's reliance was reasonable. The unequivocal statutory language prevents Oglala from asserting that it was entitled to full funding as a matter of right. *See id.* at 62, 104 S.Ct. 2218. In addition, even assuming that Oglala's reliance were reasonable, no estoppel may lie against the Government when the claim for payment out of public funds is contrary to a statutory appropriation. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 423-24, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990).

Finally, to the extent that Oglala raises other arguments[3] on various theories of entitlement to the 8.26% of indirect costs that it failed to receive in 1995, we find them unpersuasive.

CONCLUSION

For the above reasons, we reverse the IBCA's award of summary judgment that Oglala is entitled to the full amount of its indirect costs for its 1995 fiscal year ISDA contracts and remand the case for further proceedings consistent with this opinion.

COSTS

Parties shall bear their own costs.

REVERSED & REMANDED.

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[3] During oral argument, the Government clarified that whether the Government's fiduciary duty to the tribe had been breached by Interior's less-than-full funding of Oglala's indirect costs for fiscal year 1995 was outside the scope of this appeal. Therefore, we need not address this issue.

GAJARSA, Circuit Judge, additional views.

I write separately not in dissent from the final decision, because I cannot find fault with my colleagues' reasoning; rather, I write to express my concern at the manner in which Native American programs once established are funded.

From the original formation of the United States, the relationship between the Native American tribes and the central government has been one of dependency, and, in many instances, the tribes were considered wards of the state. As their relationship developed over the course of time, it was recognized as a legal trust, but it still remained a dependent system which failed to create an environment within which the tribes could pursue objectives that they themselves determined to be of paramount importance. This failure allowed the federal government to maintain the symbiotic relationship with the tribes. It was with this historic perspective that some tribal leaders sought to obtain the right to determine their own destiny and to become truly self-governing. This perspective was the impetus for a self-determination policy.

The original self-determination policy allowing Native American tribes to assume the responsibility of managing the federal programs designed for their benefit by the Bureau of Indian Affairs ("BIA"), was proposed by the Commissioner of Indian Affairs, the Hon. Louis R. Bruce, in 1970. His proposal required the entire bureaucracy to undertake a paradigm shift in the method by which the federal service programs were delivered to the Native American tribes. This shift was crucial to the realization of the self-government of the tribes. The management of the various programs by the beneficiaries was a basic but pragmatic change in the then existing relationship between the United States and Native American tribes. The com-

placency and patronizing manner with which the federal bureaucracy had rendered services to the Native Americans was troubling not only to Commissioner Bruce, who was only the second Native American to be appointed to that position, but also to then President Nixon. The President had taken a special interest in Native American issues and raised them to a major priority during his administration.

The underlying, primary objective of the self-determination policy was to provide Native American tribes with the opportunities to develop leadership skills crucial to the effectiveness of self-government. To affect this objective, the federal government granted the Native American tribal governments decision making authority for the federal programs serving their reservations.[1] This objective was to be accomplished within the parameters of the legal trust relationship existing between the tribes and the federal government. It is this trust relationship that establishes the legal obligation between the Native American communities and the federal government. This legal obligation, pursuant to numerous treaties and judicial opinions, has been recognized from the incipient stages of the federal government to the present day. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980); *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942); *United States v. Shoshone Tribe*, 304 U.S. 111, 117-18, 58 S.Ct. 794, 82 L.Ed. 1213 (1938); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831). This trust relationship, however, does not exist exclusively and solely between the tribes and the Executive branch. It also extends to the Legislative branch.

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[1] Ironically, the first tribe to negotiate an agreement to take over the BIA services in 1970, which served as a precursor for the later enactment of the Indian Self-Determination Act, was the Miccosukee tribe, one of the parties to these appeals.

The statutory structure for the self-determination policy did not come into being until Pub.L. No. 93-638 was enacted by the Congress in 1975. The statute was known as the Indian Self-Determination and Education Assistance Act, Pub.L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 USC § 450, et seq.) ("ISDA"). Initially, the structure did not allow for specific administrative support costs, the indirect or support costs were taken directly from the program funding. It was finally understood that taking these costs from the program funding shortchanged the programs and limited the extent of the coverage available from the programs. The Congress subsequently authorized the Secretary of the Interior ("Secretary") to negotiate annually the "Indirect Cost Agreement" with the tribal representative.

Under the program, the Office of Inspector General ("OIG"), by delegation from the Secretary, negotiates with the tribes the Indirect Cost Agreement, which sets forth the indirect cost rate incorporated into the ISDA contracts. The Department of Interior then uses the indirect cost rate to determine the amount of contract support cost funding payable to the tribal contractor under the statute. The Indirect Cost Agreement negotiations usually take place prior to the start of the fiscal year or prior to the Congress' budget appropriation. The OIG and the tribes negotiate in good faith that program funds will be appropriated and that indirect costs will be adequately funded. Indeed, the Congress has recognized that "[f]ull funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed." S.Rep. No. 100-274, at 13 (1987), reprinted in 1988 U.S.C.C.A.N. 2620, at 2632.

The Congress established the Indirect Cost Agreements because it was cognizant that the success of the self-

determination program hinged upon the infusion of indirect costs to support the administrative overhead burden that was to be carried out by the tribal contractor. Knowing that it had shifted the burden of providing the program services to the tribal members from the BIA to the tribal governments, the Congress appropriated the necessary funds required to manage such programs. For many years the Congress, by its continued support, recognized and carried forth its trust obligation under the ISDA. Through these programs, the tribes have improved the quality of life for their members. The self-determination policy has been woven into the fabric of the overarching trust relationship, in which the Congress and the Secretary jointly execute the responsibilities of their trust. The 1994 Appropriations Act, however, raises the unpleasant specter that the Congress, now wishing to limit the obligation that is clearly stated in the preamble of the statute, 25 U.S.C. § 450, intended to avoid, and in effect eliminate, its trust obligation by the "notwithstanding" clause, 25 U.S.C. § 450j-1(b), thereby vitiating the entire program.

The critical thread of this country's social fabric is the belief that laws exist to protect our institutions and to enforce obligations undertaken by various agreements. *See, e.g., Trustees of Dartsmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819). Our democratic government is based upon the premise that we are a country of laws that are fair, just, and equally applied for the protection of all its citizens. The saliency of any Congressional action derives from the government's duty to fulfill its legal obligations. Americans take great pride in the fact that when our government makes a promise, it keeps that promise or suffers the consequences of its breach. *See United States v. Winstar*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996). Sadly, in the present case, we are confronted with promises made and promises broken.

Although we as a court do not legislate but only interpret the laws that are enacted by the legislature, we cannot, and should not, stand by idle without calling attention to the travesty that has been perpetrated in these cases. As we have stated in our opinions, when the statutory language is unambiguous, the judicial inquiry is complete and the sole function of the court is to enforce the statute according to its terms. However, what course should a court take when, as here, the statutory language is clear but the legislative intent is equally clear yet would impose a different outcome? While a court must consider the statutory language to ascertain if it "has a plain and unambiguous meaning with regard to the particular dispute in the case," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843, 846, 136 L.Ed.2d 808 (1997), might it also seek to determine whether that language is in conflict with the clear statutory scheme that the Congress designed to satisfy its trust responsibilities? Should not the Congress resolve this conflict?

Here, the government does not expressly argue that the 1994 Appropriations Act repealed the provisions of the ISDA authorizing the indirect support contracts that the tribal organization and the OIG negotiated. The effect of the 1994 Appropriations Act, however, is to leave the Native American tribes without recourse to recover the expenses that they had already incurred by performing BIA functions in reliance on the OIG negotiations. If the Congress continues the appropriation reductions, similar to the 1994 Appropriations Act, giving effect to the "notwithstanding" language would not only amend but effectively repeal the authorizing statute.

The federal government cannot obviate its legal trust obligations by subsequent statutory amendments when others have acted in reliance on the government's initial position. The federal government should be bound by an

agreement independent of the form of, or the parties to, that agreement. In *Winstar v. United States,* 64 F.3d 1531 (Fed.Cir.1995), this Court stated that the terms of a government contract, like any other contract, do not change with the enactment of subsequent legislation, absent a specific contractual provision providing for such a change. This position was affirmed in *United States v. Winstar,* 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), in which the Supreme Court reasoned that the notion that the federal government could avoid a contractual obligation through subsequent legislation would conflict with the government's "own long-run interest as a reliable contracting partner in the myriad of workday transactions of its agencies." *Id.* at 883, 116 S.Ct. 2432.

Moreover, in the specific context of the Native American and federal government relations, the Supreme Court has explicitly recognized that

> In carrying out its treaty obligations with Indian Tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which is found expressly in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Seminole Nation v. United States, 316 U.S. 286, 296-97, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942) (footnotes omitted). This principle applies with equal force to legislative actions. Having exacted this fiduciary responsibility, the *Seminole Nation* decision supports the proposition that any Congressional limitation on trust obligations owing to Native American tribes must be clearly expressed and specifically supported by the surrounding circumstances

and legislative history. In the present case, we not only have the Congress' clear intent established as a matter of policy, but we also have the requirement that tribes enter into agreements on the good faith that the Congress will fulfill its legal obligation.

If the federal government is to carry out its trust responsibility, it is incumbent upon the Secretary to seek and request the necessary funds in the appropriation process and for the Congress to appropriate those funds. Failure to do so by the Secretary and the Congress, in and of itself, may be considered a breach of the federal government's fiduciary obligation to carry out its trust responsibility.

The federal government, in this instance, relies on *Republic Airlines, Inc. v. United States Dept. of Transp.*, 849 F.2d 1315, 1320 (10th Cir.1988), for the proposition that the Congress can in fact amend a substantive underlying statute through an appropriations act. The government's reliance on that particular decision, however, is misplaced because that case is distinguishable from *New York Airways, Inc. v. United States*, 177 Ct.Cl. 800, 369 F.2d 743 (1966). In *Republic Airlines*, there was clear congressional intent to eliminate the substantive programs, see 849 F.2d at 1318-22, while in *New York Airways* the court specifically provided that in order for an appropriations act to modify an underlying statute, the appropriations act must clearly manifest the congressional intent to do so, see 369 F.2d at 749-51. In the present case, the 1994 Appropriations Act did not mention the authorizing statute (the ISDA), and the relevant legislative history left no doubt that the Congress knew it was not affirmatively altering the obligations under the authorizing statute and did not intend to do so. The Congress, by inserting limiting language in the same subsection that contains a clear mandate to fund the indirect cost agree-

ments, cannot by such dialectic antagonism effectively curtail the substantive program by failing to enact the necessary appropriations that are required to carry out the programs. The government clearly and fundamentally is in error when it ignores the statutory mandates of the substantive enacted legislation creating the program upon which the annual appropriation is based and which governs the use of funds in the absence of later amendatory statutory language.

Notwithstanding our statutory interpretation, other Native American tribes might consider seeking alternative remedies, perhaps premised on the *Winstar* doctrine, for their incurred indirect costs, if in fact not funded, through an action before the Court of Federal Claims.

[DoI Logo]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF CONTRACT APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

APPEALS OF ALAMO NAVAJO SCHOOL BOARD, INC. and MICCOSUKEE CORP.

Decided: December 4, 1997

IBCA 3463-3466
IBCA 3560-3562

Grant Nos. 34X02701, 34X02703, & GTS50T02623 and Contract Nos. CTS50T02602-2609, 2611-2612, 2615, & 2621

Bureau of Indian Affairs

Appellants' Motions for Partial Summary Judgment Granted; Government's Motions for Summary Judgment Denied

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OPINION BY
ADMINISTRATIVE JUDGE PARRETTE

I. STATUS OF APPEALS

The Alamo Navajo School Board, Inc. (Alamo), and the Miccosukee Corporation (Miccosukee), two Feder-

ally recognized Indian Tribal organizations, have appealed the various decisions by the Department's Bureau of Indian Affairs (BIA) not to provide full funding of the Appellants' indirect costs—specifically, contract support costs (CSC's) under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. § 450j-1 (1994), and administrative cost grants (ACG's) in connection with the Tribally Controlled Schools Act of 1988 (TCSA), 25 U.S.C. § 2008 (1994). Alamo's appeals involve ACG's for 4 consecutive school years commencing in 1990, and Miccosukee's appeals involve both CSC's and an ACG for fiscal year 1994, all of which were reduced in amount because of shortfalls in BIA's total lump-sum congressional appropriation for the operation of Indian programs (OIP) in fiscal years 1990-94.

The disputes have arisen because the statutory language with respect to the calculation and payment of indirect costs is mandatory rather than discretionary. *See, e.g.*, 25 U.S.C. §§ 450j-1(a)(2), 450j-1(d)(2), 450j-1(g), 450*l*(c)(b)(4) [sic], 2008(a)(1), and 2008(d)(4) (1994). Yet these authorizing Acts also provide that indirect cost funding is subject to the availability of appropriations. *See, e.g.*, 25 U.S.C. §§ 450j-1(b), 450*l*(c)(b)(4), and 2008(a)(1) (1994). The Acts further make clear that no funding is to be increased for one tribe at the expense of other tribes, 25 U.S.C. §§ 450j-1(b) and 2008(g)(2) (1994), and that amounts allocated for indirect costs are in addition to, and are not a basis for reducing, program or direct costs. *See* 25 U.S.C. §§ 450j-1 *passim* and 2008(a)(2) (1994).

The matter is before the Board on cross-motions for summary judgment on the legal issue of whether full funding of indirect costs, previously ascertained and agreed upon in a contract or grant agreement, is required by the two authorizing Acts when there is either a shortfall in

total OIP appropriations or a specific funding limitation exists with respect to CSC or ACG payments. If full funding is required, then the parties agree that the case should be remanded for a determination of quantum. We concur in that approach and therefore do not discuss a further issue raised by the Government in its pleadings; i.e., whether any ACG must be subtracted from the base amount before determining the amount of a CSC payment to which a multi-program contractor is entitled.

We have jurisdiction over the dispute pursuant to 25 U.S.C. §§ 450b(j), 450m-1(d), and 2508(e) (1994). *Rock Point Community School Board,* IBCA Nos. 3008, 3010, 93-2 BCA ¶ 25,777. Briefings by the parties in support of their motions were extensive, and oral argument was presented at the Board's Arlington, Virginia, hearing room on May 13, 1997, followed by final briefs. On the basis of the entire record, we have concluded that the position urged by the Appellants is the one most consistent with established contract and appropriations law and that the Tribes are entitled to full payment of their indirect costs, absent clear and specific provisions to the contrary in applicable appropriation Acts.

II. FACTS

(from documents and briefs provided by the parties)

A. *Alamo* (ACG appeals only, school years 1990-94):

1. In Title V of Pub. L. No. 100-297, April 28, 1988, 102 Stat. 369, 25 U.S.C. § 2008, Congress established ACG's, by which the money for administrative and indirect costs would be provided to BIA-funded schools operated by tribes or tribal organizations.

2. The ACG *amount* is calculated annually by the BIA's Office of Indian Education Programs and is determined by multiplying the school's administrative cost per-

centage rate by the total amount of the direct program base funding for the fiscal year. The ACG percentage *rate* is determined by applying the formula set out in section 2008(c).

3. Alamo's ACG percentage rates were 20.72 percent for school year 1990-91; 20.26 percent for school year 1991-92; 19.19 percent for school year 1992-93, and 19.38 percent for school year 1993-94. But the BIA provided only 91.66 percent of Alamo's resulting ACG entitlement in school year 1990-91; 86.30 percent in school year 1991-92; 61.13 percent in school year 1992-93; and 77.51 percent in school year 1993-94, despite the BIA's announced figures of 91.93 percent (1990-91), 89.44 percent (1991-92), 65.08 percent (1992-93), and 83.58 percent (1993-94), per Stipulation by the parties dated September 30, 1996.

4. In none of the 4 school years in question did the BIA pay uniform percentages of their ACG entitlements to every tribe. The percentages of ACG entitlements actually paid to eligible recipients in those years varied widely, from 73 percent to 129 percent (1990-91), 62.47 percent to 105.20 percent (1991-92), 21.73 percent to 72.73 percent (1992-93), and 65.17 percent to 100.90 percent (1993-94), per Stipulation by the Alamo parties dated September 30, 1996.

5. As of August 5, 1996, there existed an expired unobligated balance of OIP funds in the amount of $3,384,220 appropriated for fiscal year 1991 and an additional $1,001,341 in fiscal year 1991 funds available for obligation in fiscal year 1991-92, per Stipulation by the Alamo parties dated September 30, 1996.

6. As of August 5, 1996, there existed an expired unobligated balance of OIP funds in the amount of $3,442,301 appropriated for fiscal year 1992, and an additional

$3,709,137 in fiscal year 1992 funds available for obligation in fiscal year 1992-93, per Stipulation by the Alamo parties dated September 30, 1996.

7. As of August 5, 1996, there existed an expired unobligated balance of OIP funds in the amount of $7,889,102 appropriated for fiscal year 1993 and an additional $2,484,106 in fiscal year 1993 funds available for obligation in fiscal year 1993-94, per Stipulation by the Alamo parties dated September 30, 1996.

8. On July 28, 1994, Alamo requested a grant officer's decision regarding the BIA's failure to provide full funding for these 4 years. The grant officer denied the claims on the ground that all ACG funds had already been expended.

9. Appropriations for the OIP for fiscal years 1990-94 were well in excess of $1 billion per year, of which well in excess of $200 million each year was specifically made available for school operations and other education costs. No specific funding amounts or limitations (earmarks) were specified for ACG's.

10. Alamo appealed to this Board for two reasons: First, because not all applicable direct costs had been included in the cost base when the ACG percentages were applied during each of the 4 years in question; and, second, because a lower ACG percentage than that derived from the authorizing statute was used.

B. *Miccosukee* (12 CSC claims for fiscal year 1994; 1 ACG claim fiscal year 1994)

11. Misccosukee is a tribal organization authorized by the Miccosukee Tribe to carry out several noneducation self-determination contracts. It also has a contract to operate an elementary/secondary school.

12. The BIA is required by statute to provide CSC payments to self-determination contractors under the ISDA, as well ACG's for school operations. The CSC indirect cost rate is determined by annual negotiations with the Department's Office of the Inspector General (OIG). The resulting rate, which is formalized in a written agreement, is then multiplied by the total direct cost base of Miccosukee's contracts for fiscal year 1994 to determine the CSC amount.

13. Congress enacted a lump-sum appropriation in excess of $1.49 billion for the OIP for fiscal year 1994, some of which was earmarked for certain objectives. An indirect cost limitation of $91,223,000 was imposed on ISDA payments made under that Act. However, no limitation on ACG's was specified, Pub. L. No. 103-138, Nov. 11, 1993.

14. On December 28, 1993, the BIA issued a Notice in the Federal Register, 58 Fed. Reg. 68694 (1993), which stated that in the event of a shortfall in fiscal year 1994 CSC funds, it would distribute an equal proportion of their indirect cost percentages to each contractor. It was not until June 1994, however, that the BIA notified ISDA contractors that it would distribute only 81.21 percent of the contractors' CSC needs as set forth in the contracts that had been negotiated with the OIG.

15. Miccosukee had negotiated a 41.51-percent indirect cost rate with the OIG for fiscal year 1994, but the BIA ultimately distributed only 81.21 percent of the CSC amount due to Miccosukee for its contracts in fiscal year 1994. Miccosukee claims entitlement to the full 41.51 percent that had been negotiated.

16. Miccosukee was entitled to an 18.79-percent ACG for its education contract under the statutory formula, but received only 83.58 percent of that amount in fiscal year 1994. It claims entitlement to the full 18.79 percent.

17. The contracting officer's (CO's) August 17, 1995, final Decision denied Miccosukee's claims on the ground that it had not presented evidence that it had *incurred* indirect costs and administrative costs in the amounts claimed. However, the Government has not sought to defend the CO's Decision on that ground.

III. POSITIONS OF THE PARTIES

A. *Arguments by the Government*

The Government's principal argument against the full funding of CSC's and ACG's when there is a reduction in appropriations is that the authorizing statutes state explicitly that they are subject to the availability of appropriations. Thus, when the amount of funds necessary to fully fund indirect costs exceeds the amount appropriated, a pro rata reduction is required under 25 U.S.C. §§ 450j-1(b) and 2008(g) (1994). "Simply put," the Government argues, "the law does not require the Secretary * * * to spend more money than the relevant appropriations legislation has provided." (Government's Opposition to Miccosukee's Motion for Partial Summary Judgment at 2.)

Second, relying on *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.2d 1338 (D.C. Cir. 1996) (hereinafter referred to as *Ramah I*), the Government argues that, rather than taking funds from "direct cost" or "program" funding, the courts have clearly sanctioned a pro rata reduction in ACG's whenever the Department's total OIP appropriations are insufficient for both full program and indirect cost funding. It cites *City of Los Angeles v. Adams*, 556 F.2d 40 (D.C. Cir. 1977), in support of a pro rata reduction whenever there is an overall shortfall in appropriations.

Third, citing *Lincoln v. Vigil*, 113 S. Ct. 2024, 2031 (1993), the Government asserts that the Department has no duty to provide full funding for ACG's because no funds were ever specifically appropriated for that purpose; and thus, the allocation of the lump-sum OIP funds that were appropriated was left to agency discretion. Although the Government readily admits that reprogramming funds to fully fund ACG's is *legally* possible citing the General Accounting Office's (hereinafter, GAO's) (*Principles of Federal Appropriations Law*, 2d ed., vol. II, 6-159), it argues that such an action is both highly undesirable for political reasons and not legally required.

Fourth, the Government strongly emphasizes the importance of keeping faith with the Congress in not expending more than the Appropriations Committees intended for any particular function, noting that not adhering to the allocations prescribed in the Committees' reports or agreed upon as a result of staff negotiations with the Committees could result in further funding reductions for the program in future years.

B. *Arguments by Appellants*

Appellants place their primary emphasis on the mandatory language directing full indirect cost funding contained in both the TCSA and the ISDA, arguing that the Department has a legal duty to pay 100 percent of their ACG's, as determined by the statutory formula, as well as 100 percent of their CSC's, as negotiated between the tribal contractor and the OIG. They stress the language of S. Rep. No. 274, 100th Cong., 2d Sess. 2632 (1988), to the effect that "[f]ull funding of tribal indirect costs associated with self-determination contracts *is essential if the federal policy of Indian self-determination is to succeed*," (Miccosukee motion for partial summary judgment; emphasis in brief), and they note that this

language accompanied the 1988 amendments adding mandatory contracts support provisions to the ISDA.

Miccosukee points out that its agreement with the OIG was entered into at the beginning of the school year, on September 29, 1993, whereas the BIA's letter stating that it had unilaterally reduced Miccosukee's CSC distribution was not received until June 1994, 9 months later. Thus, Miccosukee was belatedly forced to absorb the entire cost of the shortfall at the very end of the school year. Citing 25 U.S.C. § 2008(a)(1)(A) (1994), Miccosukee argues that the purpose of ACG's, like the purpose of the CSC's, was to ensure that tribes would not be forced to compromise their programs by siphoning off program dollars for overhead costs.

For example, the BIA told Congress that it was unable to cover more than 65 percent of the administrative costs of TCSA-funded schools in school year 1992-93, (DOI Budget Justification, fiscal year 1994). But the Department did not request any additional funding for fiscal year 1993, despite the addition of three more eligible TCSA schools before the budget was submitted. As a result, in its report accompanying the fiscal year 1993 appropriation Act, the Congress noted:

> The managers are concerned at the failure of the Department and the Bureau to inform the Committees of shortfalls in funding, and the lack of effort to address these shortfalls. The managers direct that the Bureau provide a quarterly report on projected shortfalls to the Committees during fiscal year 1993, including proposed methods to address these shortfalls.

H.R. Conf. Rep. No. 102-901, 2nd Sess., accompanying Pub. L. No. 102-381, 106 Stat. 1374 (1992).

Alamo asserts that the BIA has never made an effort either to request adequate appropriations or to reprogram funds sufficient to fully fund ACG's, even though at least once during the 4 years of Alamo's claims the BIA actually did reprogram funds for other purposes. The basic legal issue in this case, in Alamo's view, is whether the BIA had the legal duty to reprogram funds to make up the shortfall in ACG's, a mandatory statutory payment, for the years in question.

Appellants contend that "[d]etermining whether there is a legal duty depends upon the statutory language creating the right to the money and the law appropriating the funds." They maintain that "[t]his Board can decide this legal question without reference to whether the money is available to reprogram," (Appellants' July 17, 1997, Reply to BIA's June 18 memorandum in Response to Oral Argument Statements at 4).

Like the Government, Appellants point out that all funds in a lump-sum appropriation that are not specifically earmarked are available for reprogramming by the agency to meet its obligations. They also quote GAO's *Principles of Federal Appropriations Law*, 2d ed., vol. I, 2-25, which states that "[t]he authority to reprogram is implicit in any agency's responsibility to manage its funds; no statutory authority is necessary."

Unlike the Government, however, Miccosukee asserts that while the appropriations limitation in the fiscal year 1994 appropriations Act, (Factual statement (FS) 13), may delay payment, it does not defeat the ultimate obligation of the Government to pay its statutory and contractual debts, because the BIA has a "continuing obligation to fund" CSC's under the authorizing Act, absent clear language "modifying or repealing, expressly or by clear implication, the substantive law," citing *New York*

Airways, Inc. v. United States, 369 F.2d 743, 748-49 (Ct. Cl. 1966), upon which Miccosukee primarily relies to support its CSC claims, (Miccosukee's Motion for Partial Summary Judgment brief at 19-20).

IV. DISCUSSION

A. *The Ramah Cases*

We will not attempt to provide here a detailed description of the indirect cost procedures of the ISDA and the TCSA, partly because the circuit courts in *Ramah I*, *supra*, and, *Ramah Navajo School Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) (*Ramah II*), have already done so, and partly because without any prior knowledge of the *Ramah* cases, it would be difficult for the reader to comprehend fully the complexity of the statutory procedures and the issues involved in these appeals.

This Board also had occasion, a decade ago, to deal with similar issues and principles. *Navajo Community College*, IBCA No. 1834, 87-2 BCA ¶ 19,825 (modified on other grounds, 87-2 BCA ¶ 19,826) (*cf. Ramah I*), and *Devil's Lake Sioux Tribe*, IBCA No. 1953, 88-1 BCA ¶ 20,320 (*cf. Ramah II*). Although both Board decisions were written before the 1988 amendments to the Acts involved here, they are relevant here because they arrived at similar results even in the absence of an explicit statute; specifically, that contracts and agreements are to be honored, even Government contracts with Indian tribes.

Similarly, neither of the *Ramah* cases is actually controlling in these appeals because each of them dealt with a narrower issue. Moreover, *Ramah I*'s general comments concerning the necessity of pro rata allocations when there are shortfalls in overall funding, heavily relied upon by the Government, were clearly only dicta. *See United*

States v. Daniels, 902 F.2d 1238, 1241 (7th Cir. 1990) ("Judicial assumptions concerning, judicial allusions to, and judicial discussions of issues that are not contested are not holdings"; citations omitted).

In addition, *Ramah I* involved a fiscal year 1995 appropriations Act, and *Ramah II* involved a fiscal year 1990 appropriations Act; whereas, these appeals involve appropriations Acts between fiscal year 1990 and fiscal year 1994.

Nevertheless, the holdings in the *Ramah* cases, and the related rationales of the two Federal Circuits in these decisions, are highly relevant to these appeals. Both cases shed light on the intent of Congress with respect to the mandatory provisions of the ISDA and the TCSA concerning indirect costs.

In *Ramah I*, the district court, relying on *Lincoln v. Vigil*, *supra*, had held that the method of allocating insufficient appropriations to CSC's was committed by law to agency discretion and therefore was not judicially reviewable. On appeal, however, the circuit court found no support in the text or history of the ISDA or in prior case law for that conclusion. The circuit court stated unequivocally that "Congress has clearly expressed in the ISDA both its intent to circumscribe as tightly as possible the discretion of the Secretary," (citing section 450k(a)), and that "the statute itself reveals that not only did Congress *not* intend to commit allocation decisions to agency discretion, it intended quite the opposite; Congress left the Secretary with as little discretion as feasible in the allocation of [CSC's]." 87 F.3d at 1344.

The sole issue in *Ramah I* was whether the Secretary could impose a 50-percent reduction in the CSC funds of any tribe that did not submit a proposal justifying its fiscal year 1995 indirect cost rate by a given date. The

court held that such a penalty was beyond the Secretary's authority.

In *Ramah II*, the OIG and the Tribe had disagreed on whether to include two state contracts as part of Tribe's direct cost base for the purpose of determining its CSC indirect cost rate under section 450j-1(a)(2) and (d). The OIG wanted to include them, since the larger the direct cost base, the lower the CSC rate and the lower the entitlement. Again, the district court had found for the Secretary. But the 10th Circuit found the authorizing statute ambiguous and, rather than finding for the agency as it might otherwise have done, held that in Indian cases the normal rules of statutory construction do not apply and that ambiguous provisions must be interpreted for the Indians' benefit, citing *Albuquerque Indian Rights v. Lurjan*, 930 F.2d 49, 59 (D.C. Cir. 1991), *inter alia*.

See also Commonwealth of Massachusetts v. United States Department of Transportation, 93 F.3d 890, 893 (1996), in which the District of Columbia Circuit once again acknowledged that statutes must be construed liberally in favor of Indians, with ambiguous provisions interpreted to the Indians' benefit.

The court in *Ramah II* also found support for its holding in the legislative history of the 1988 amendments, which were "intended to assure maximum participation by Indian tribes in the planning and administration of federal services, programs and activities for Indian communities," 112 F.3d at 1461, quoting from S. Rep. No. 274, 100th Cong., 1st Sess., 1-2 (1987). The court concluded, "We therefore agree with plaintiff that the 1988 amendments to the Act mandate that tribes executing self-determination contracts receive full funding for all reasonable contract support costs associated with self-determination contracts," *ibid.* at 1463.

The Congress is fully capable of enacting either discretionary or mandatory language, whichever it intends, in its authorizing statutes, depending on their purpose. *See, e.g., American Telephone & Telegraph Co. v. United States*, CAFC No. 95-5153, Sept. 24, 1997, at 17 ("Congress knows how to impose mandatory provisions in contracts"). As to discretionary language, *see*, for example, 25 U.S.C. § 450h(a) (1994), which begins: "The Secretary of the Interior *is authorized* * * * to contract with or make a grant or grants to any tribal organization," etc., and section 450h(b), which begins: "The Secretary of Health and Human Services *may* make grants to any Indian tribe or tribal organization," etc., (emphasis added).

By contrast, section 450j-1(a)(2) begins: "There *shall* be added to the amount *required* by paragraph (1) contracts support costs which *shall* consist of," etc. Paragraphs 2008(a)(1) and (b)(1), similarly begins, "(1) The Secretary *shall*, subject to the availability of appropriated funds, provide grants," etc., and "(2) The amount of the grant * * * *shall* be determined," etc.

In *Commonwealth of Pennsylavnia v. Weinberger*, 367 F. Supp. 1378, 1381 (D.D.C. 1973), the court noted that "[s]tatutory language that an official 'shall' perform an act has been repeatedly held to be mandatory in nature [citations omitted]. *It deprives the official of discretion and makes the commanded act a duty, a ministerial act*," (emphasis added). Although this view is completely consistent with the D.C. Circuit's analysis in *Ramah II*, the issues in this case require that we also construe the "subject to the availability of appropriated funds" language in both the ISDA and the TCSA.

B. *Availability of Unrestricted or Lump-Sum Appropriations*

The parties to these appeals presumably would not deny that the Congress typically provides the Secretary with far more discretionary than earmarked funds in the Department's annual lump-sum OIP appropriation. The Government argues, however, that the BIA must keep faith with the Congress by using these discretionary funds in the manner requested in the Department's budget presentations, or as subsequently specified in the applicable committee reports, as the case may be. But Appellants assert that the mandatory language concerning CSC's and ACG's in the authorizing legislation has priority and that, if necessary, the Secretary must reprogram discretionary funds in order to fully fund the mandatory indirect cost entitlements.

Both parties accept the "fundamental principle" set forth by the Supreme Court in *Lincoln v. Vigil, supra,* that where

> Congress merely appropriates lump-sum amounts *without statutorily restricting what can be done with those funds,* a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any requirements on the agency.

113 S. Ct. at 2031 (emphasis added). But the Government clearly errs in ignoring the statutory constraints *in the substantive legislation* upon which the annual appropriation is based, which govern the use of funds in the absence of later statutory language.

Thus, Appellants must prevail. *See International Union v. Donovan,* 746 F.2d 855, 860-61 (D.C. Cir. 1984),

in which the court said: "The issue here is not how Congress expected or intended the Secretary to behave, but how it *required* him to behave, through the only means by which it can (as far as the courts are concerned, at least) require anything—the enactment of legislation."

In essence, the lack of any earmark in an appropriation Act simply means that the Congress does not intend to change whatever prescriptions are already contained in the authorizing statute. Therefore, before using any funds from its lump-sum OIP appropriation for discretionary purposes, the BIA has a clear obligation to first give priority to the various mandatory programs and activities of the ISDA and the TCSA, including indirect costs. The Department has no discretion in this matter. *Ramah I, supra.*

That is not to say that the BIA cannot reduce the amounts of its direct grants under these programs whenever there are shortfalls in the Department's current OIP appropriation. Obviously it can and must do so. If there is a resulting reduction in a tribal organization's direct cost base, it necessarily follows that there will be a shortfall in its indirect cost funding. But BIA must still apply to the total reduced direct cost base the precise indirect cost percentage rates that have previously been determined pursuant to the ISDA and TCSA statutory formulations.

It would appear that the easiest method of achieving the required result would be for the BIA, upon receipt of an annual OIP lump-sum appropriation, to first determine the fair proportion of total funds to which a given tribal organization is entitled under whatever criteria are appropriate, and then to apportion that amount between direct and indirect funding by simple arithmetic, as the substantive Acts would seem to have contemplated in the absence of line-item funding.

But, we hasten to add that our assumption as to the best manner of making primary allocations among tribes is no less dictum than that of the *Ramah I* court in its preference for pro rata allocations. What *is* required, with respect to the issues before us, is that ISDA and TCSA indirect cost rates not be reduced in order to increase direct or program funding. It obviously would accomplish little if a tribal school were given additional discretionary funds for its academic programs but were unable to pay its lighting and heating bills.

Thus, our first conclusion is simply that, in making allocations and disbursements for indirect costs under contracts and grants pursuant to the ISDA and the TCSA, and funded under unrestricted lump-sum appropriations enacted by the Congress for OIP programs generally, the Department remains bound by the mandatory language of the authorizing legislation, despite shortfalls in the total amounts appropriated, because in providing indirect costs under these Acts, the Department is performing an essentially ministerial function. It has no authority to modify administratively the clear statutory mandates giving priority to indirect costs. *Ramah I.*

Similarly, absent a specific revision of the authorizing legislation by either an amendment of the substantive Act or a clear provision in an appropriations Act, the Department has no authority to change either the direct cost base (multiplicand) by which an indirect cost rate is to be multiplied or the percentage rate (multiplier) that is determined either by agreement with the Inspector General or by statutory formula.

It follows that the restriction in the authorizing Acts, to the effect that the Indian tribes' entitlement to full funding of their indirect costs is subject to the availability of appropriations, simply does not apply where the current OIP appropriation is in the form of an unrestricted

lump-sum amount that is more than sufficient to cover such mandatory funding and where the Department's current appropriations Act lacks any statutory earmark affecting the use of funds for such purposes.

C. *Indirect Cost Funding under Earmarked Appropriations*

1. *Legal Background*

Unlike the foregoing situation where ACG costs are funded under lump-sum appropriations, and where there is clearly no *legal* objection to the reprogramming of discretionary funds in order to fully fund mandatory payments, the obligations of the Secretary in situations where mandatory funding needs exceed the amount of an earmarked appropriation are not immediately evident. But, the basic principles governing the latter situation have nevertheless existed for well over a century and perhaps since the early days of the republic.

As we have seen, (FS 13), for fiscal year 1994 the Congress imposed an indirect cost limitation, or earmark, of $91,223,000 for ISDA payments, which apparently was insufficient for full funding of the indirect costs to which tribal organizations were entitled under the ISDA contracts they had entered into with the OIG, (FS 14). As a result, Miccosukee received only 81.21 percent of the amount to which it claimed entitlement under its OIG contracts, (FS 15), and the CO subsequently denied its claim for the rest of its entitlement, (FS 17).

The issue, therefore, is whether Miccosukee is entitled to full funding through a judgment by this Board. Based upon our extensive, and fairly exhaustive, research of the relevant cases, we have determined that the answer is yes. As the Supreme Court said in *United States v. Bostwick*, 94 U.S. 53 (1876), involving damage to property leased for the use of Union troops during the Civil War,

"The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them," 94 U.S. at 66.

That principle remains unchanged to this day. *See, e.g.*, the discussion of contracts in *United States v. Winstar*, 116 S. Ct. 2432, 2455-65 (1996), quoting Justice Brandeis in *Lynch v. United States*, 292 U.S. 571, 580 (1934), that "[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors," a quotation that apparently originated in the *Sinking Fund Cases*, 99 U.S. 700, 718-19 (1879). *See also Perry v. United States*, 294 U.S. 330, 351-52 (1934) ("When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference * * *.")

Thus, in *Collins v. United States*, 15 Ct. Cl. 22 (1879), decided 3 years after *Bostwick*, the Court of Claims stated:

> On the part of the defendants it is further objected that the claimant cannot recover in this action because there is no appropriation of money for the payment of this claim; and that clause of the Constitution which says that "no money shall be drawn from the Treasury but in consequence of appropriations made by law" is cited in support of this objection (Con., Art 1, @ 9, cl. 7).
>
> That provision of the Constitution is exclusively a direction to the officers of the Treasury, who are intrusted with the safe-keeping and payment out of the public money, and not to the courts of law; the

> courts and their officers can make no payment from the Treasury under any circumstances.
>
> This court, established for the sole purpose of investigating claims against the government, does not deal with questions of appropriations, but with the legal liabilities incurred by the United States under contracts, express or implied, the laws of Congress, or the regulations of the executive departments.

15 Ct. Cl. at 35.

This Board, of course, has the same jurisdiction in deciding appeals involving Government contract claims as the Court of Federal Claims, which succeeded the United States Claims Court and, previously, the United States Court of Claims, with respect to that function, 41 U.S.C. § 607(d) (1994).

In the appeals before us, the Government does not *expressly* argue that the earmark in the fiscal year 1994 appropriations Act repealed the provision of the ISDA authorizing CSC contracts for indirect costs to be entered into between a tribal organization and the OIG. But, as Appellants note, if the Board were to decide that Miccosukee has no legal recourse to recover the expenses that it had already incurred in performing its BIA functions in reliance on its OIG contract, at the time the reduction in appropriations for CSC's was first announced by the BIA, then the limitation in the appropriations Act would have the effect of amending or repealing the authorizing statute.

About such repeals by implication, the Supreme Court in *TVA v. Hill*, 437 U.S. 153, 190 (1977), a century after the two cases quoted above—and citing *Morton v. Mancari*, 417 U.S. 535, 549 (1974), and *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)—said

that "the intention to repeal must be clear and manifest." Quoting from *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-57 (1945), the Court concluded that "[o]nly a clear repugnancy between the old * * * and the new [law] results in the former giving way." The Court emphasized that, "[t]he doctrine disfavoring repeals by implication applies with full vigor when * * * the subsequent legislation is an *appropriations* measure," (citations omitted).

Whether the Government is bound by a transaction is essentially independent of the form of the transaction. *See, e.g.*, discussion in *Winstar v. United States*, 64 F.3d 1531, 1547-50 (Fed. Cir. 1995) ("The terms of a government contract, like any other contract, do not change with the enactment of subsequent legislation absent a specific contractual provision providing for such a change," 64 F.3d at 1547), *aff'd United States v. Winstar*, 116 S. Ct. 2432 (1996) ("The Government's position * * * would [confiict] with the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies," 116 S. Ct. at 2459.

Even if a CSC agreement were considered, *arguendo*, to be merely a form of grant arrangement rather than a bilateral contract, a grant entitlement can still trigger Government liability, as GAO noted in the chapter on Federal Assistance: Grants and Cooperative Agreements, in its *Principles of Federal Appropriations Law*, 2d ed., vol. II, 10-8 & 10-9. Quoting the Claims Court in *Community Relations-Social Development Commission v. United States*, 8 Cl. Ct. 723 (1985), GAO notes that even "a notice of a federal grant award in return for the grantee's performance of services can create cognizable obligations to the extent of the government's undertakings therein."

The Claims Court itself stated in the above case, 8 Cl. Ct. at 725:

> Defendant contends that this court lacks jurisdiction to consider the claim because plaintiff's grant is not the type of contract on which the United States has consented to be sued pursuant to 28 U.S.C. § 1491.
>
> Defendant contends that a grant is not a contract, as it evinces no contractual language or intent to be bound. This question, however, has already been laid to rest by the Court of Claims, which has held that a notice of a federal grant award in return for the grantee's performance of services can create cognizable obligations.

Citing Missouri Health & Medical Organ., Inc. v. United States, 226 Ct. Cl. 274, 278-79, 641 F.2d 870, 873 (1981).

Missouri Health is indeed specific in this respect: "Defendant is mistaken in its position that an obligation which is enforceable in this court can only be evidenced by a contract duly executed by the parties. An instrument, other than the traditional formal contract, can create obligations which are cognizable in this court," 226 Ct. Cl. at 278.

The GAO summarizes this principle as follows: "Thus, if a grantee does what it has committed itself to do and incurs allowable costs, the government is obligated to pay," *ibid.* at 10-9.

It must also be noted that contractual and quasi-contractual obligations between the Government and Indian tribes may well rise above the level of ordinary contracts. As this Board said in *Devil's Lake Sioux Tribe, supra,*

(88-1 BCA at 102,733), quoting from *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942):

> With respect to Indian treaty obligations * * * the Government is "something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."

This principle even applies to legislative actions. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the United States Supreme Court reversed a decision by the Minnesota Supreme Court which assumed that Minnesota had a right to impose a $147.95 tax on a mobile home on Indian trust land because the right of taxation had not been expressly excluded by the Federal statute in question, 28 U.S.C. § 1360 (1994), which gave Minnesota jurisdiction over civil causes of action between Indians. The Supreme Court adhered to the view that it had expressed in *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973), dealing with a claim that an Indian reservation had been terminated by Congress. In that opinion, because clear language was not employed by Congress, no intent to terminate could be inferred. "A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."

Furthermore, as the Supreme Court noted in *Quick Bear v. Leupp*, 210 U.S. 50, 81 (1907), in connection with a controversy over the use of moneys appropriated for Indian educational purposes:

> The President declared it to be the moral right of the Indians to have this "Trust Fund" applied to the education of the Indians in the schools of their choice, and the same view was entertained by the Supreme Court of the District of Columbia and the Court of Appeals of the District. But the "Treaty Fund" has exactly the same characteristics. They are moneys belonging really to the Indians. They are the price of land ceded by the Indians to the Government. The only difference is that in the "Treaty Fund" the debt to the Indians created and secured by the treaty is paid by annual appropriations. *They are not gratuitous appropriations of public moneys, but the payment, as we repeat, of a treaty debt in installments.* We perceive no justification for applying the [nonsectarian use of funds] proviso or declaration of policy to the payment of treaty obligations, the two things being distinct and different in nature and having no relation to each other, except that both are technically appropriations.

(Emphasis added.)

Although we have made no attempt to trace the likely evolution of "treaty fund" payments (i.e., those owed to the various tribes that voluntarily or involuntarily surrendered their lands to the Government in the course of this nation's westward expansion) into routine annual appropriations, we note that in *Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir. 1981), the court said that "[i]t is fairly clear that *any* Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes," citing *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

2. *Applicable Case Law Generally*

However, this Board does not have to depend on the Federal Government's special relationship to Indians for a favorable decision in Miccosukee's behalf. Among the early cases cited by the Government in opposing full funding of indirect costs, in situations where the appropriations Act contains a contrary earmark, is *Shipman v. United States*, 18 Ct. Cl. 138 (1883), in which the court said that "where an alleged liability rests *wholly* upon the authority of an appropriation they must stand and fall togethher, so that when the latter is exhausted the former is at an end, to be revived, if at all, only by subsequent legislation by Congress," 18 Ct. Cl. at 147 (citations omitted; emphasis added).

The implication of the Government's use of this quotation can only be that there is no real basis for CSC funding except the appropriations Act itself. However, the Government ignores the *Shipman* court's own explanation of this principle, 18 Ct. Cl. at 146-47, which is as follows:

> The liability in *this* case rests *wholly upon the appropriation, and is different from* those cases which frequently arise wherein Congress passes an act authorizing officers to construct a building or do other specified work, without restriction as to cost, and then makes an appropriation inadequate to do the whole of it or makes none at all.
>
> *In such cases the authority to cause the work to be done and to make contracts therefor is complete and unrestricted.* All work, therefore, done under the direction of the officers thus charged with the execution of the law creates a liability on the part of the Government to pay for it, and if a written contract be made and work be done in excess of the contract-specifications, or entirely outside of or in addition to

> the written contract, and such work inures to the benefit of the United States, in the execution of the law, or is accepted by the proper public officers, a promise to pay its reasonable value is implied and enforced.
>
> *We have frequently held that where there is liability on the part of the Government, it is not avoided by the omission on the part of Congress to provide the money with which to discharge it.*

Citing Collins Case, supra, at 35 (emphasis added).

It should also be noted that the Court of Claims decided *Dougherty v. United States,* 18 Ct. Cl. 496 (1883), in the same year as *Shipman's Case.* In *Dougherty,* the court commented on *Shipman* as follows, 18 Ct. Cl. 503:

> We held in Shipman's Case, this term (ante 138), that when *one contract on its face* assumes to provide for the execution of *all the work authorized* by an appropriation, the contractor is bound to know the amount of the appropriation, and cannot recover beyond it; *but we have never held that persons contracting with the Government for partial service under general appropriations are bound to know the condition of the appropriation account at the Treasury or on the contract book of the Department.* To do so might block the wheels of the Government. The statutory restraints in this respect apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government. (Rev. Stat. §§ 3679, 3732.)

(Emphasis added.)

The Government also alleges that *Sutton v. United States,* 256 U.S. 575 (1921), supports the proposition that the United States is not liable for work performed in excess of an appropriation, contending that any contrac-

tual right of Miccosukee to entitlement is expressly subject to funding limitations. It relies heavily on *Republic Airlines, Inc. v. United States Department of Transportation*, 849 F.2d 1315, 1320 (10th Cir. 1988), which in turn cites *United States v. Dickerson*, 310 U.S. 554, 555 (1940), for the proposition that Congress can in fact amend substantive legislation through an appropriations act.

The Government's reliance is misplaced, however, since the court in *Republic* itself clearly distinguishes the case before it from *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966), upon which Appellants rely. As the court in *Republic* said, at 849 F.2d at 1322:

> [T]he major premise upon which the *New York Airways*' decision rests is that the appropriations act in question did not clearly express Congress' intention to modify the underlying statute. The appropriations act did not mention [the authorizing Act], and the relevant legislative history left no doubt that the Congress knew it was not altering obligations [under the authorizing Act] *and did not so intend.* Quite the opposite situation is before us. The appropriations act [in *Republic*] * * * clearly reflected Congress' intentions to curtail and phase out [the authorizing Act.]

(Emphasis added.)

The appropriation language in *Dickerson*, moreover, contained a clear *prohibition* against the use of the funds for the purpose at issue, notwithstanding the authorizing legislation, 310 U.S. at 555. That is not the case here.

We also note that in *City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977), frequently cited by the Government for other purposes, the court said:

> When Congress modifies a statute by an appropriations measure, or any other amendment, the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint. [The appropriations Act] only restricted the *amount* the FAA could obligate. [It] said not a word about the method of distributing the money available. We hold that the FAA was required to distribute the money available so as to preserve the allocation formula provided by [the authorizing Act.]

Thus, the obvious answer to the Government's contentions in reliance on cases like *Sutton, Republic,* and *Dickerson* is that the Congress not only did not amend the substantive legislation in the appeals before us, but it evinced no inclination to do so. Therefore, the mandatory indirect cost priorities contained in the ISDA and the TCSA still apply.

Rather than conceding the applicability of *Sutton* and *Dickerson,* Appellants rely on such cases as *Ferris v. United States,* 27 Ct. Cl. 542 (1892), and *Ross Construction Corp. v. United States,* 392 F.2d 984 (Ct. Cl. 1968). We will discuss *Ross* later.

In *Ferris,* 27 Ct. Cl. at 546, the court said:

> A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects. An appropriation *per se* merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat

> the rights of other parties. (*Dougherty's Case*, 18 C. Cls. 496.)

The GAO has clarified the distinction between *Ferris* and *Sutton* as follows (*Principles of Federal Appropriations Law*, 2d ed., vol. II, 6-18):

> The distinction between the *Ferris* and *Sutton* lines of cases follows logically from the old maxim that ignorance of the law is no excuse. If Congress appropriates a specific dollar amount for a particular contract, that amount is specified in the appropriation act and the contractor is deemed to know it. It is certainly not difficult to locate. If, on the other hand, a contract is but one activity under a larger appropriation, it is not reasonable to expect the contractor to know how much of that appropriation remains available for it at any given time. A requirement to obtain this information would place an unreasonable burden on the contractor, not to mention a nuisance for the government as well.

Perhaps it would not be inappropriate at this point to point out that even this Board was unsuccessful in its effort to learn exactly how OIP funds are allocated and apportioned by the BIA. During oral argument, the following exchange occurred:

> JUDGE PARRETTE: What I'm getting at is not so much the numbers, but if this really is a pass-through operation, why is there money left over?
>
> MS. BARBERO: Judge, I think that's a very good question. And I don't know the answer to that. In FY '93, there was nearly $8 million left over, unexpended from Operation of Indian Programs. * * *
>
> MR. DEAN: * * * Just to clarify why there may be unexpended funds, it's not a total pass-through

> operation in that the Bureau continues to operate programs, administer programs, they continue to have vacant positions, and over the years in the past, there have often been years in which the bureau doesn't spend all of its money. It's rare that they come down right on the dot.
>
> So, while the bureau has sometimes said that all of our funds are sort of provided to this tribe and that tribe and that tribe, the fact remains that there end up being funds which, unless they are spent in some way for Indian service programs, will go back to the Treasury.

(Transcript at 141-43.)

Subsequent to oral argument, the BIA belatedly informed the Board that there are several variables affecting the BIA's ability to estimate accurately and secure in advance the amount of funding sufficient for ACG's and CSC's. Among those mentioned, were that (1) during a given year, other tribes may take over some BIA functions and thus cause changes in funding allocations; (2) 2 fiscal years are involved in each school year; (3) the formula for determining the amount of school grants is complex and based on the number of students then enrolled; (4) school funding begins on July 1 preceding the next fiscal year's appropriation, and adjustments then must be made based on the actual appropriation; (5) CSC ratios are based on past overhead costs, which may change during the coming fiscal year; and (6) the BIA budget request must be submitted to the Department and then to the Office of Management and Budget in the February before the actual fiscal year begins; and numerous changes may occur before that budget is presented to the Congress, which then may make its own changes.

The point to be made, in the context of the *Ferris* versus *Sutton* line of cases, is that if this Board, after a full oral briefing, could not ascertain with precision how OIP funds are allocated after they are appropriated, then how can an Indian tribe—particularly one associated with a remote western reservation, like Alamo—be expected to know the status of their funding in advance of the BIA's allocation?

Surely, all the Indian tribes can be expected to know are the indirect cost percentages by which their entitlements are to be multiplied under the contract and grant agreements they have signed with the BIA in accordance with the formulas that Congress itself previously prescribed—indeed, previously mandated. Thus, Indian tribal agreements with the BIA clearly fall within the *Ferris* category, where the contractor cannot be charged with knowledge of the availability or unavailability of appropriations, rather than within the *Sutton* case category where the contractor is deemed to know the status of its line-item appropriation.

D. *Cases Principally Relied on by the Parties*

We have already discussed both *Ramah I*, relied on by the Government, and *Ramah II*, relied on by Appellants, sufficiently that we will not discuss them again here.

1. *The Procurement Cases*

In *Meyne v. United States*, 110 Ct. Cl. 527 (1948), the contractor was to construct temporary buildings on an Army fort using paved roads which the Government promised would be available for access; but when the contrator was ready to begin, military authorities ordered the paved roads closed, and the contractor had to construct and pave alternate access roads. The court granted

recovery, explaining that the Government "cannot enter into a binding agreement that it will not exercise a sovereign power [i.e., its right to close the roads], but it can say, if it does, it will pay you the amount by which your costs are increased thereby," *ibid.* at 550, citing *Bostwick, supra.* Thus, the exercise of a sovereign power does not alter existing contractual obligations.

In *Miller v. United States*, 348 F.2d 475, 172 Ct. Cl. 60 (1965), a Capehart housing contractor's Government-caused overruns forced it to exceed the $16,500 cost-per-unit mortgage financing limitation in the National Housing Act. Allowing recovery of the excess, the court, 172 Ct. Cl. at 68, said:

> Concededly, Congress did not, in specific terms, provide that a contractor may be reimbursed for expenses incurred (in excess of the mortgage proceeds) for additional work caused by errors or defects in the government's plans and specifications or required by changed conditions encountered in the performance of the contract. Nevertheless, we find it difficult to conclude that Congress meant that the contractor would remain without a remedy in all such cases. Therefore, we will not attribute to Congress an intention that would produce an impractical, unjust, and unworkable result unless that intention appears clearly on the face of the statute or in the supporting record.

In *Ross v. United States*, 392 F.2d 984, 986 (Ct. Cl. 1968), another Capehart housing case, the court, citing *Miller*, also refused to penalize the contractor for Government-caused overruns, stating that "absent the most explicit of statutory language, a Congressional limitation on expenditures should not be read as excluding recovery for circumstances over which the contractor could

have no control and which were not its fault." The court went on to add:

> For years this court has made a distinction between contractors paid out of a general appropriation and those contracts for which a specific and limited appropriation is made by Congress. The former have been held not barred at all by exhaustion of the appropriation, on the theory that "a contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, legal or illegal, to other objects."

Citing Ferris, supra, and other cases.

In *Healy v. United States*, 576 F.2d 299, 216 St. Cl. 172 (1978), the contractor sued to recover the extra costs resulting from shutting down, and then resuming, a construction project when the Government ran out of funds. This Board had denied the appeal on the ground that the work stoppage would not have occurred if the contractor had adhered to the approved construction program, since the supplemental appropriation needed for completion was in fact passed shortly after the shutdown. But the contractor argued in the Court of Claims that the stoppage had resulted from the Government's prior actions in budgeting and requesting inadequate appropriations for the project. The court agreed. It held, 576 F.2d at 307-08, that

> the protective umbrella of the *funds available clause*, as worded in this contract, does not extend to an exhaustion of funds occasioned by the agency's decision to request funding grossly inadequate to support the level of earnings approved by the agency for the fiscal year. In order not to be misunderstood, we

> add at this point we are not holding that under this contract the defendant's executive branch was contractually obligated to request from defendant's legislative branch appropriations adequate to fund continued performance. It may well have been free to decide it would request any level it pleased. We hold only that (a) a contract will not be construed to throw all the cost and loss necessarily incident to such a decision on the contractor, and none of it on the party whose decision occasioned the loss, unless the clauses of the contract require that result without ambiguity, and (b) that a government agency that claims a right to do this is under an implied obligation to assist its contractor, by timely and candid information, to take the measures that the latter may deem best to diminish and mitigate its loss.
>
> * * * *
>
> The [IBCA] has lost sight of the fact that *it was the government which initially repudiated and discredited the approved program by choosing not to budget adequate funds* to finance the scale of construction called for in the program. The Board itself takes the anomalous position that Healy should be bound by the approved schedule when the government in fact displayed no intent to be bound by it in any way whatsoever.

(Emphasis added.)

It takes very little imagination to perceive an analogy between the funding actions of the Department's Bureau of Reclamation in *Healy* and those of the BIA in this case. *See* quotation from the Appropriations Conference Committee that follows the third paragraph in the summary of Appellant's arguments, *supra,* setting forth the Committee's concern over BIA's failure to address repeated shortfalls in Indian program funding.

Finally, *Blackhawk v. United States*, 622 F.2d 539 (Ct. Cl. 1980), involved a construction contract settlement agreement that said the Government's liability was "contingent upon the availability of appropriated funds from which payment in full can be made," a provision intended to free the Government from liability if Congress took affirmative action to prevent payment. The case involved the meaning of the quoted language and whether such an unavailability of appropriated funds had actually occurred. The contractor was aware that a reprogramming of funds would be required to pay the settlement amount but, contrary to the Government's later assertion, apparently did not know that congressional approval would be requested for it. The court notes that, in fact, such approval was *not* legally required; but when the agency sought it anyway, the Congress balked and instead enacted a law intended to deny the necessary funds.

The court described the reprogramming procedure as nothing but "an informal working arrangement between the agency and the congressional appropriations committees with whom the agency had to deal" and notes that "a failure on the part of the agency to observe the requirements of its reprogramming procedure could offer no legal basis for challenging the legality of the expenditure involved," *ibid.* at 548. The court further said that "[a]fter-the-fact rationalizations cannot obscure what [the Government's] actions so plainly show: it was obedience to political pressure rather than allegiance to established procedures which dictated the decision not to go forward with the reprogramming," *ibid.* at 550, and that "the Government's failure to have paid timely, and in full, the first principal payment due under the settlement agreement was a breach of contract," *ibid.* at 552. But, because of the condition in the agreement, once Congress had

placed a specific subsequent limit on the use of appropriated funds for the payment of settlement agreements generally, clearly having this case in mind, the contractor lost its right to any payments not already vested, *ibid.* at 553-54.

Blackhawk, of course, is unusual in that Congress, rather than approving the legally unnecessary reprogramming request, chose to deny the agency the right to make future payments under the terms of the settlement agreement. However, the case illustrates once again the two basic principles that (1) a contractor is not bound to know the status or balances of an agency's lump-sum appropriations, and therefore is entitled to recover the full amount it is due under a valid contract, including a subsequent settlement agreement; and (2) discretionary funds *can* legally be reprogrammed without congressional consent.

2. *The Quid-Pro-Quo Entitlement Cases*

One of the earliest types of cases that arose in the Court of Claims had to do with attempts by the Congress to reduce the amount of remuneration received by military and diplomatic employees during their term of office or period of entitlement. Some of these cases were appealed to the Supreme Court. In *United States v. Langston*, 118 U.S. 389 (1886), affirming *Langston v. United States*, 21 Ct. Cl. 10 (1886), the headnote says it all:

> A statute which fixes the annual salary of a public officer at a designated sum without limitation as to time, is not abrogated or suspended by subsequent enactments appropriating a less amount for his services for a particular fiscal year, but containing no words which expressly or impliedly modify or repeal it.

Citing United States v. Fisher, 109 U.S. at 143; and distinguishing *United States v. Mitchell,* 109 U.S. 146. *See also Geddes v. United States,* 38 Ct. Cl. 428 (1903); *Vulte v. United States,* 47 Ct. Cl. 324 (1912), *aff'd* 233 U.S. 509 (1914); and *Gibney v. United States,* 114 Ct. Cl. 38 (1949).

In *Gibney,* the court said, 114 Ct. C. at 53: "We know of no case in which any of the courts have held that a simple limitation on an appropriation bill of the use of funds has been held to suspend a statutory obligation. In fact, we believe a careful reading of the Comptroller General's ruling will disclose that he is in accord with this interpretation."

There are numerous cases dealing with situations where the Government required various types of common carriers to haul mail, but then attempted in appropriations bills to reduce the amount of compensation it paid them. The earliest cases involved land-grant railroads, which were required to carry the mail "at such price as Congress by law direct[s]." *See Illinois Central RR v. United States,* 18 Ct. Cl. 118, 127 (1883), in which the court noted that

> [i]n the former case [involving the Northwestern and Milwaukee railroads], which was precisely like this, this court said:
>
> > It is therefore, we think, apparent that so far as their contracts in this suit are involved the parties stand in precisely the same plight that they would be in if the roads were not land-grant roads and Congress had prescribed this reduction of the contract rate for all railroads.
>
> The Supreme Court in that case, in the very able opinion delivered by Mr. Justice Matthews, which covers the whole ground, held that the contracts were

> legal and binding upon both parties for the whole term, and that the Acts of 1876 and 1878, directing a reduction in pay, were not intended to *and could not* affect existing contracts like these.

(Emphasis added.)

Three years later, in *New York Central RR v. United States*, 21 Ct. Cl. 468, 470-72 (1886), the matter involved an 1877 contract that provided that the Post Office would reimburse the carrier out of special appropriations. Congress appropriated the necessary funds for 1877 through 1882, but then discontinued them, and the Post Office denied payment to the carrier. The court said:

> Had Congress made no further appropriation [after June 30, 1877,] for the fiscal year ending June 30, 1878, there would have been an end to the contract, because by its very terms payment was to be made out special appropriations to be made by any act thereafter passed for a similar purpose, and therefore on condition that such appropriations should be made.
>
> But Congress did pass a subsequent act each year, making appropriation for the same or a similar purpose, and thus the condition upon which the contract was to continue was fulfilled. * * *
>
> When, therefore, at the beginning of each fiscal year the Postmaster-General employed the claimant exactly as provided in the contract, and furnished for transportation the mails in accordance therewith and continued to do so throughout the year, he exercised the discretion intrusted to him, renewed and extended the contract for that year, and the defendants became liable for payment as agreed upon.

Similiarly, in *New York Central RR v. United States*, 65 Ct. Cl. 115, 128 (1928), the court said:

> In our opinion, Congress not only did not attempt to reserve power in itself to determine the fair and reasonable compensation the carriers should receive for the service but it intended to place the entire matter in a tribunal fully equipped to perform the judicial duty involved. This duty having been discharged and the amount payable ascertained, the carrier is entitled to judgment. One of the reasons assigned for the nonpayment is the lack of appropriation, and this may be a sufficient reason for the accounting officers or the Postmaster General if the appropriations for the period in question were exhausted. But it furnishes no reason why this court may not render its judgment for the amount due.

In *Seatrain Lines v. United States*, 99 Ct. Cl. 272, (1943), the Postmaster General advertised for a mail route by ship from New Orleans to Havana, which would involve a minimum of 50 trips, but not more than 100, per year. Seatrain was the only bidder, and the contract was signed in December 1931 for a period of 10 years. However, in 1933, Congress attached to the Post Office's appropriation bill a proviso that no part of the money appropriated should be paid in connecton with the contract, so the Postmaster General notified Seatrain that no more mail would be sent on its vessels. In awarding damages to Seatrain, the court said, 99 Ct. Cl. at 315:

> When Congress delegates to an agency of the Government the right to enter into a contract under certain terms and conditions, and these terms and conditions are fully carried out and a contract entered into, it becomes a valid, binding agreement of the Government, and such valid contract is protected by the Fifth Amendment and cannot be taken away without making just compensation.

These earlier transportation cases may be regarded as background to the three airline cases upon which the parties in the present case rely; namely, *New York Airways, City of Los Angeles v. Adams*, and *Republic Airlines, supra.* However, the latter two cases, cited by the Government, do not appear to support its contentions, so we will comment on them only briefly.

In *Adams*, the city of Los Angeles filed an action to compel the Federal Aviation Administration (FAA) to provide a grant to reimburse the city for expenses incurred in expanding its airport, based on a 1970 grant authorization Act that permitted, but did not mandate, the Secretary of Transportation to make grants under a statutory distribution formula for the maintenance and improvement of the national air traffic system. The moneys appropriated were to be divided one-third to the states, one-third to existing airports, and one-third to be distributed at FAA's discretion, 556 F.2d at 44.

Because Congress appropriated a lesser overall amount than FAA had anticipated, FAA decided to allocate less money to the first two purposes and more to its discretionary projects. The court said that this reallocation of funds was improper because Congress had merely reduced the amount of the appropriation and had not said a word about the method of distributing the money available, *ibid.* at 50. As Appellants point out, this is a far different situation from the mandatory CSC contracts that the BIA is required to enter into, which establish an annual ratio based on individual needs and apply that ratio to the total of program funds actually distributed. If anything, *Adams* supports the holding in *Ramah I* that a mandatory allocation of funds prescribed by statute limits an agency's discretion in making use of them.

In *Republic*, another Postal Service case, Congress expressly amended the provisions of the local airline subsidy program Act for 2 years in a row, and then terminated the program as of a future date certain, using "notwithstanding" language in the appropriations Act and referring specifically to the section of the Federal Aviation Act that was being terminated. No contractual obligations were involved; the plaintiff airlines simply asserted that "Congress intended * * * to create an entitlement which was to survive appropriations actions." The court was not persuaded, 849 F.2d at 1319. Neither are we, with respect to *Republic's* similarity to the case before us.

We do, however, find sufficient similarity in *New York Airways* to justify Appellants' reliance on it. In essence, this case follows the earlier line of transportation cases which hold that once a carrier has performed in reliance on a Government offer or directive, it is entitled to be paid, despite a shortfall in appropriated funds.

In *New York Airways*, section 406 of the Federal Aviation Act empowered the Civil Aeronautics Board (CAB) to obligate the United States for the payment of an agreed subsidy to helicopter companies for the carrying of passengers, property, and mail, in the absence of any deficiency in congressional appropriations. But by April 1965, the funds for the subsidy element of compensation earmarked by the appropriations Act for fiscal year 1965 were exhausted, and the airline was not paid the balance still due it for that month, 369 F.2d at 744. The wording of section 406 was as follows, *ibid.* at 745:

> The Postmaster General shall make payments *out of appropriations* for the transportation of mail by aircraft of so much of the total compensation as is fixed and determined by the Board under this section without regard to clause (3) of subsection (b)

> of this section. The Board shall make payments of the remainder of the total compensation payable under this section *out of appropriations made to the Board for that purpose.*

The court found for the airline. It reasoned that the failure of Congress to grant appropriations would not relieve the Government of its contract obligation once the services had been rendered, noting that the Board's duty to fix and determine fair and reasonable rates of compensation was not affirmatively conditioned upon the existence or adequacy of appropriations by Congress to pay the moneys due as the result of the Board's rate-making power. Relying on the *Ferris* line of cases, the court said, 369 F.2d at 748:

> The case law suports the plaintiff's position as to the effect of section 406(c) of the Act. It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute [distinguishing *Sutton* and *Shipman*].

The court also commented on *Dickerson* and *Gibney, supra,* as follows, *ibid.* at 750.

> The limiting language in the appropriations proviso in the *Dickerson* case would then be, in the words of the *Gibney* opinion, supra, "a legislative provision under the guise of a withholding of funds" which suspended the legal obligation, rather than a simple withholding of funds unaccompanied by other expressed or implied purposes. If the purpose of the limiting language in the appropriation under consideration in the instant case was to suspend or amend section 406(c) of the Federal Aviation Act

> of 1958, it was not so expressed by statute. Any proof of congressional intention to the contrary in the legislative history must be clear and uncontradicted to lift it from the ruling in the *Gibney* case and place it within the ambit of *Dickerson.*

The court went on to say, *ibid.* at 751-52:

> The actions of the parties support the existence of a contract at least implied in fact. The Board's rate order was, in substance, an offer by the Government to pay the plaintiffs a stipulated compensation for the transportation of mail, and the actual transportation of the mail was the plaintiff's acceptance of that offer. No formal contract document was required to support the existence of the contract so implied. The same order established the rate of subsidy to be paid plaintiffs. Thus, from a contractual standpoint, the transportation of mail by the carrier provided the consideration for both the service and subsidy elements of the compensation which became enforceable on performance of the services.

Finally, the court disposed of the Government's contention that the contract with the airline was made invalid by the Anti-Deficiency Act, 31 U.S.C. § 665(a) (1994); now codified at 31 U.S.C. § 1341 (1994), as follows, *ibid.* at 752:

> Since it has been found that the Board's action created a "contract or obligation [which] is authorized by law," obviously the statute has no application to the present situation, unlike the case in *City of Los Angeles v. United States,* 68 F. Supp. 974, 107 Ct. Cl. 315 (1946), where the contract between the plaintiff and the Department of the Interior had no statutory authorization and was thus invalid.

In the case before us, the CSC contracts with the BIA were clearly authorized by law and relied upon by Miccosukee in providing the educational and other services that the BIA would otherwise have had to provide. Therefore, on the basis of *New York Airways*, the Government's obligation to fund these indirect costs in accordance with the contract remains intact, despite the dollar ceiling in the applicable appropriation act.

As *New York Airways* also illustrates, a formal written contract is not necessary to obligate the Government if the other party performs some act or function for which payment or compensation is promised.

Thus, in *Mayo v. United States*, 319 U.S. 441 (1943), the State of Florida attempted to impose an inspection fee and stamps on commercial fertilizer purchased outside of the State in connection with the Agriculture Department's Soil Conservation program. The soil-building and soil-conserving practices when carried out by a participating farmer entitled him to a grant or benefit payment. To earn this payment, phosphate fertilizers were furnished to him in advance by the Government, and their costs were deducted from the grant, 319 U.S. at 443.

The court said that in promoting soil conservation activities, the United States was acting in a Governmental capacity, and that the distribution of fertilizer directly to farmers was part of that activity. Thus, unless Congress authorized it, a state had no right to regulate the program. The grant was earned as soon as the farmer met the program requirements, *ibid.* at 444-48.

In a similar case, *Aycock-Lindsey v. United States*, 171 F.2d 518 (5th Cir. 1948), the court decided that it had jurisdiction under the Tucker Act, 28 U.S.C. § 1346

(1994), over an action by a naval stores producer to receive subsidy payments under the Soil Conservation Act on the theory that its claim arose under a law of Congress and under an implied contract which it performed and which entitled it to the payment of a subsidy under Department of Agriculture regulations. The court awarded the subsidy payments.

In *Griffin v. United States*, 215 Ct. Cl. 710 (1978), the plaintiff sued for additional compensation under an Air Force suggestion program when he proposed using periscopes in the Minuteman missile silos, thereby allegedly saving the Government some $45,000,000 but receiving only $8,905 in return, contrary to the formula in the program's regulations. The Government argued that the program was discretionary; but the court said that while the Secretary may originally have had uncontrolled and unreviewable discretion in the matter, once he published procedures and guidelines and implemented them, he surrendered some of his discretion and the legal possibility of abuse of discretion entered the picture. Accordingly, the court remanded the case for trial to determine proper compensation.

Thus, we conclude that even if the basis, form, and content of Indian self-determination contracts and TCSA grants for indirect costs were not expressly prescribed by statute—and probably even if no contract were involved, but entitlement was claimed simply on the basis of the tribe's performance of BIA functions—the Department would be as legally bound by its lawful contracts and agreements, whether written or implied-in-fact, as a private contractor would be under similar circumstances.

3. *The Highland Falls and Inernational Union Cases*

There are, of course, many different types of Federal grant programs. A large number of them involve gratuitous subsidy programs that provide their payments to public or quasi-public agencies and require no consideration except that the recipient use the funds in the manner intended by the authorizing Act.

Such is not the case here. The Government has had a long-standing affirmative duty under its treaty and trust responsibilities to provide educational and similar assistance to Indian tribes, and the tribes have entered into contracts with the BIA pursuant to statute to carry out these functions on behalf of the BIA. But, again, even ignoring this special relationship of the Federal Government to Indian tribes, the cases cited by the Government in support of an alleged Departmental discretion in the use of OIP funds are not applicable to the facts of this case.

The two cases, besides *Ramah I, Adams,* and *Republic,* that the Government thinks ought to be controlling in this case are *Highland Falls-Fort Montgomery Central School District v. United States,* 48 F.3d 1166 (Fed. Cir. 1995), and *International Union, supra.* We will consider *International Union* first.

In *International Union,* the Secretary of Labor was given a $3.7 billion lump-sum appropriation to carry out the Trade Adjustment Assistance (Trade Act) program to provide benefits to workers and companies adversely affected by competition from foreign imports. A subsequent amendment to the Trade Act also authorized, but did not require, the Secretary to provide training for displaced workers when such training would make the worker employable again. In fiscal year 1982, the Congress provided an additional $25 million for training, job search

allowances, and relocation. The Secretary allocated the $25 million for this purpose, but he then allocated the entire original $3.7 billion appropriation for other purposes; and the Union sued him for not making more money available for training and for not reimbursing workers for training costs already incurred. The court found for the Secretary on the ground that a lump-sum appropriation confers discretion on the agency as to its use.

The difference between the Trade Act program and the ISDA and TCSA programs, of course, is that in these latter programs, Congress not only authorized but mandated the payment of indirect costs under specific formulas. As the courts in *Ramah I and II* found, no discretion was involved. The Secretary's duties were only ministerial.

In *Highland Falls*, the Department of Education (DOE) was required to allocate funds for various entitlements under the Impact Aid Act to school districts that had lost revenues because of nontaxable local properties owned by the Federal Government. Although the method of allocation was mandatory, the entitlement to funds under the Act was not, 48 F.3d at 1167. Thus, when DOE intially received lump-sum appropriations for the purposes of the Act, it followed the priorities in the original statute.

However, in fiscal years 1989-93, Congress not only did not appropriate enough money to fully fund these lost-revenue entitlements, but specifically earmarked the amounts of money to be spent on *each* of the various sections of the Act; and the Department then followed these specifications, even though the priorities in the appropriation Acts differed from the priorities in the authorizing Act. The plaintiff argued that money should be taken from other earmarked funds to carry out the priorities in the original Act, but the court held that DOE's

method of allocation harmonized the requirements of the Act and of the appropriations statutes and was therefore proper.

As the Appellants note, the *Highland* court read the shortfall allocation provision in the Act, which gave priority to payments for lost revenues, to apply only when Congress enacted a lump-sum appropriation. But when the enacted appropriation, as in that case, provided *only* earmarked funds, then the court concluded that those earmarks, as well as the shortfall provisions of the Impact Aid Act, would control, in accordance with the anti-transfer and anti-deficiency Acts. Therefore, the court held, the school district did not have a valid claim against the Government for any additional funds.

Because the ISDA, like the legislation, in *New York Airways, Healy,* and *Blackhawk,* contains no such shortfall provision, *see Ramah I,* 87 F.3d at 1348, there would be no way to reconcile its mandatory indirect cost funding provisions with an inadequate appropriation *except* by finding a repeal by implication of these provisions of the authorizing Act, which—as we have seen—did not occur.

The very fact that Miccosukee's CSC contract restated the cautionary language that it was subject to the availability of appropriations clearly illustrates why the courts over the years have refused to place the full burden of general appropriations shortfalls and subsequent earmark limitations on the private parties who deal with, and justifiably rely on, the Government to do what, pursuant to an authorizing Act, it has said it will do. Otherwise, the Government's contractual promises would become a mere sham.

Miccosukee's contract was entered into, pursuant to deliberate and specific statutory mandate, many months before the relevant appropriations Act was passed. There

was no way that Miccosukee or, indeed, anyone, could have foreseen either the provisions or the amount that the final appropriations Act would prescribe. Meanwhile, the tribe was engaged in performing the BIA's traditional functions in good faith and in reliance on its OIG contract, precisely as the ISDA intended.

To reiterate what the *Shipman* court said, "where there is liability on the part of the Government, it is not avoided by the omission on the part of Congress to provide the money with which to discharge it." *Accord, Gibney*, 114 Ct. Cl. 38: "We know of *no case* in which *any* of the courts have held that a simple limitation on an appropriation bill of the use of funds has been held to suspend a statutory obligation," (emphasis added).

Of course, if Congress after enacting the ISDA had refused to appropriate *any* funds for it, that might have been a different story. *See, e.g.*, the two *New York Central* cases, 21 Ct. Cl. at 470 and 65 Ct. Cl. at 128, and *Seatrain*, 99 Ct. Cl. at 315, cited above. But that did not happen here. Therefore, under the ISDA, Miccosukee is legally entitled to the full funding of its CSC contract, based on the tribe's actual performance in reliance on it. *Ramah II*, 112 F.3d at 1463.

V. CONCLUSION AND DECISION

A. *Conclusion*

Unlike the situation in *American Telephone, supra*, there was nothing illegal about the self-determination contracts that Alamo and Miccosukee entered into with the BIA under the TCSA and the ISDA for these tribal organizations to carry out the BIA's functions. In that respect, both the tribes and the BIA did exactly what Congress directed them to do. The problem arose when sub-

sequent appropriations Acts did not sufficiently fund those commitments and when the BIA, as in *Ramah I*, decided it knew best how to apportion the reduced appropriation.

In some sense, therefore, the issue in this case is not so much whether the BIA should keep faith with Congress but, rather, whether Congress should keep faith with the Indians in funding the ISDA and TCSA, thereby honoring the treaties and promises that it and the executive branch have made to the tribes over the last century and a half. Here, however, as we have seen, the question is more or less academic because the law appears to be on the side of the Indians, independent of the Government's trust responsibilities.

The Board is not unaware of the difficulties that this appeal may create for the BIA in either following our decision or attempting to overturn it in the courts. But as the Court of Claims said in *Geddes, supra*: "The judgment of a court has nothing to do with the means—with the remedy for satisfying a judgment. It is the business of the courts to render judgments, leaving to Congress and the executive officers the duty of satisfying them," 38 Ct. Cl. at 444. And, finally, as the Supreme Court said in *TVA v. Hill*, 437 U.S. at 194-95:

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power to veto.

B. *Decision*

1. Accordingly, we grant the Appellant's motion for summary judgment and hold that

a) Alamo is entitled to full ACG funding for school years 1990-91 through 1993-94, based on the percentages derived from the statutory formula and the total amount of the direct program base funding for each fiscal year.

b) The direct program base for the above purpose shall include *all* appropriate direct funding provided to Appellants each year.

c) Miccosukee is entitled to full indirect cost funding in fiscal year 1994, using the percentages derived from the statutory formula for ACG's and from the agreements entered into with the OIG for CSC's.

2. The Government's motions for summary judgment are denied.

3. These appeals are hereby remanded to the parties to negotiate the amounts of increased funds required in accordance with this decision.

/s/ B. V. Parrette
BERNARD V. PARRETTE
Administrative Judge

I concur:

/s/ Gene Perry Bond
GENE PERRY BOND
Chief Administrative Judge

[DoI Logo]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
Interior Board of Contract Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

March 2, 1998

IBCA 3463-66
IBCA 3560-62

APPEALS OF ALAMO NAVAJO SCHOOL BOARD, INC.
and MICCOSUKEE CORPORATION

Grant Nos. 34X02701, 34X02703, & GTS50T02623; and Contract Nos. CTS50T02602-2609, 2611-2612, 2615, & 2621

Bureau of Indian Affairs

ORDER GRANTING RECONSIDERATION
BUT REAFFIRMING DECISION

On January 8, 1998, the Government timely moved for a Reconsideration of our Decision granting Summary Judgment for Appellants in the above-entitled matter, which was decided by the Board on December 4, 1997. Briefs were received from the Government on January 20 and from Appellants on February 23, 1998. The Government alleges primarily that the Board has ruled both against the substantial weight of the law and contrary to the substantial weight of the evidence. It admits, however, that "little, if anything, that we are advancing in this motion has not in some manner already been put forth to this Board."

Because of the importance of the issues involved, we have nevertheless reconsidered the matter on the basis of the parties' latest briefs.

As Appellants note, the thrust of the Government's challenge is that the Board failed to properly interpret the phrase "subject to availability of appropriations" that appears in both of the statutes under consideration. In construing that language, the Board relied on case law that dates back to the post-Civil-War period, and remains consistent to the present day, to the effect that the United States is as bound by its contracts as a private party and that the Government cannot avoid its obligations because of reduced appropriations in situations where the private party has already performed its contractual obligations *unless* the Congress makes abundantly clear its intention to achieve that specific effect. It did not do so here.

The Board then contrasted *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966) with *Republic Airlines, Inc. v. United States Department of Transportation*, 849 F.2d 1315 (10th Cir. 1988), to illustrate the point. We note that in their brief, Appellants continue to rely on *New York Airways*, as the Board itself largely did. We continue to find the Government's efforts to distinguish this case to be inapropos and unpersuasive.

Accordingly, our prior decision is hereby reaffirmed.

/s/ Bernald V. Parrette
BERNARD V. PARRETTE
Administrative Judge

I concur:

/s/ Gene Perry Bond
GENE PERRY BOND
Chief Administrative Judge

STATUTORY PROVISIONS

25 U.S.C. § 450j-1

§ 450j-1. Contract funding and indirect costs

(a) Amount of funds provided

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct operaton of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this subchapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall;—

(A) be used to provide additional services or benefits under the contract; or

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 13a of this title.

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contrary necessary—

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

(b) Reductions and increases in amount of fund provided

The amount of funds required by subsection (a) of this section—

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to—

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this subchapter or as provided in section 450j(c) of this title.

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

(c) Treatment of shortfalls in indirect costs recoveries

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount

of need for indirect costs associated with a self-determination contract.

(d) Liability for indebtedness incurred before fiscal year 1992

Indian tribes and tribal organizations shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect costs, as defined in Office of Management and Budget Circular A-87, incurred for fiscal years prior to fiscal year 1992.

(e) Limitation on remedies relating to cost disallowances

Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty-five days of receiving any required annual single agency audit report or, for any period covered by law or regulation in force prior to enactment of chapter 75 of Title 31, any other required final audit report. Such notice shall set forth the right of appeal and hearing to the board of contract appeals pursuant to section 450m-1 of this title. For the purpose of determining the 365-day period specified in this paragraph, an audit report shall be deemed to have been received on the date of actual receipt by the Secretary, if, within 60 days after receiving the report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency report as insufficient due to noncompliance with chapter 75 of Title 31, or noncompliance with any other applicable law. Nothing in this subsection shall be deemed to enlarge the rights of the Secretary with respect to section 476 of this title.

(f) Addition to contract of full amount contractor entitled; adjustment

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

(g) Indirect costs for contracts for construction programs

In calculating the indirect costs associated with a self-determination contract for a construction program, the Secretary shall take into consideration only those costs associated with the administration of the contract and shall not take into consideration those moneys actually passed on by the tribal organization to construction contractors and subcontractors.

(h) Indian Health Service and Bureau of Indian Affairs budget consultations

On an annual basis, the Secretary shall consult with and solicit the participation of, Indian tribes and tribal organizations in the development of the budget for the Indian Health Service and the Bureau of Indian Affairs (including participation of Indian tribes and tribal organizations in formulating annual budget requests that the Secretary submits to the President for submission to Congress pursuant to section 1105 of Title 31).

(i) Use of funds for matching or cost participation requirements

Notwithstanding any other provision of law, a tribal organization may use funds provided under a self-deter-

mination contract to meet matching or cost participation requirements under other Federal and non-Federal programs.

(j) Allowable uses of funds without approval of Secretary

Without intending any limitation, a tribal organization may, without the approval of the Secretary, expend funds provided under a self-determination contract for the following purposes, to the extent that the expenditure of the funds is supportive of a contracted program:

(1) Depreciation and use allowances not otherwise specifically prohibited by law, including the depreciation of facilities owned by the tribe or tribal organization.

(2) Publication and printing costs.

(3) Building, realty, and facilities costs, including rental costs or mortgage expenses.

(4) Automated data processing and similar equipment or services.

(5) Costs for capital assets and repairs.

(6) Management studies.

(7) Professional services, other than services provided in connection with judicial proceedings by or against the United States.

(8) Insurance and indemnification, including insurance covering the risk of loss of or damage to property used in connection with the contract without regard to the ownership of such property.

(9) Costs incurred to raise funds or contributions from non-Federal sources for the purpose of furthering the goals and objectives of the self-determination contract.

(10) Interest expenses paid on capital expenditures such as buildings, building renovation, or acquisition or fabrication of capital equipment, and interest expenses on loans necessitated due to delays by the Secretary in providing funds under a contract.

(11) Expenses of a governing body of a tribal organization that are attributable to the management or operation of programs under this subchapter.

(12) Costs associated with the management of pension funds, self-insurance funds, and other funds of the tribal organization that provide for participation by the Federal Government.

(k) Suspension, withholding, or delay in payment of funds

(1) The Secretary may only suspend, withhold, or delay the payment of funds for a period of 30 days beginning on the date the Secretary makes a determination under this paragraph to a tribal organization under a self-determination contract, if the Secretary determines that the tribal organization has failed to substantially carry out the contract without good cause. In any such case, the Secretary shall provide the tribal organization with reasonable advance written notice, technical assistance (subject to available resources) to assist the tribal organization, a hearing on the record not later than 10 days after the date of such determination or such later date as the tribal organization shall approve, and promptly release any funds withheld upon subsequent compliance.

(2) With respect to any hearing or appeal conducted pursuant to this subsection, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for suspending, withholding, or delaying payment of funds.

(l) Use of program income earned

The program income earned by a tribal organization in the course of carrying out a self-determination contract—

(1) shall be used by the tribal organization to further the general purposes of the contract; and

(2) shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

(m) Reduction of administrative and other responsibilities of Secretary; use of savings

To the extent that programs, functions, services, or activities carried out by tribal organizations pursuant to contracts entered into under this subchapter reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of contract funds determined under subsection (a) of this section, the Secretary shall make such savings available for the provision of additional services to program beneficiaries, either directly or through contractors, in a manner equitable to both direct and contracted programs.

(n) Rebudgeting by tribal organization

Notwithstanding any other provision of law (including any regulation), a tribal organization that carries out a self-determination contract may, with respect to allocations within the approved budget of the contract, rebudget to meet contract requirements, if such rebudgeting would not have an adverse effect on the performance of the contract.

(o) Redesignated (n)

(Pub.L. 93-638, Title I, § 106, as added Pub.L. 100-472, Title II, § 205, Oct. 5, 1988, 102 Stat. 2292, and amended Pub.L. 101-301, § 2(a)(8), (9), May 24, 1990, 104 Stat. 207; Pub.L. 101-644, Title II, § 203(a), Nov. 29, 1990, 104 Stat. 4666; Pub.L. 103-413, Title I, § 102 (14)-(19), Oct. 25, 1994, 108 Stat. 4257-4259; Pub.L. 105-362, Title VIII, § 801(g), Nov. 10, 1998, 112 Stat. 3288.)

BUREAU OF INDIAN AFFAIRS
OPERATION OF INDIAN PROGRAMS

107 Stat. 1391

* * * *

Provided further, That not to exceed $91,223,000 of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs associated with contracts or grants or compacts authorized by the Indian Self-Determination Act of 1975 . . . .